IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRUCE THOMPSON, as Personal Representative of the Wrongful Death Estate of RICHARD BROWN,

Plaintiff-Appellant,

No.30537

No. D-0722-CV-09-174
Judge Kevin Sweazea
Torrance County

vs.

TORRANCE COUNTY BOARD OF COMMISSIONERS, SHERIFF CLARENCE GIBSON, DOROTHY GIBSON, JEANINE ARNOLD, MICHAEL STACK, JAMES LEDBETTER, and DEPUTY JOHN DOE, individually and as Torrance County sheriff's officers and employees, and THE STATE OF NEW MEXICO, NEW MEXICO STATE POLICE, a division of the NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, FARON SEGOTTA, CHIEF OF POLICE, SHARON DOE DISPATCHER, and OFFICER CHRIS COLEY, individually and as New Mexico State Police Officers and employees,

Defendants-Appellees.

APPELLEES' ANSWER BRIEF

Pursuant to Rule 12-214(B)(l), Appellees respectfully request oral argument in this matter. This case presents significant public policy concerns and Appellees request the opportunity to further discuss the issues raised with the Court.

Dennis K. Wallin
Brandon Huss
Wallin & Briones Law Firm, LLC
8500 Menaul Blvd NE
Albuquerque, NM 87110
505-246-0120
Fax: 505-246-0121

Attorneys for Defendants Torrance County Board of Commissioners, Sheriff Clarence Gibson, Dorothy Gibson, Michael Stack, James Ledbetter, and Deputy John Doe, individually and as Torrance County Sheriff's officers and employees

Mary T. Torres
Beall & Biehler
6715 Academy NE
Albuquerque, NM 87109
505-828-3600
Fax: 505-828-3900

Attorneys for Defendant Jeanine Arnold

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), undersigned counsel certifies this brief was prepared in 14-point Times New Roman typeface, and the body of the brief contains 8012 according to Microsoft Word 2010.

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I. STANDARD OF REVIEW

A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo. *Valdez v. State*, 2002-NMSC-028, ¶4, 54 P.3d 71, 74. See also *Chavez v. Desert Eagle Distribg. Co. of N.M.*, 2007-NMCA-018, 151 P.3d 77, 80. Dismissal is proper under Rule 1-012(B)(6) when the law does not support the claim under the facts presented. *Stoneking v. Bank of Am., N.A.*, 2002-NMCA-042, ¶4, 43 P.3d 1089, 1090-91. The purpose of a motion to dismiss is to test the law of the claim, not the facts that support it. *Gonzales v. United States Fidelity & Guar. Co.*, 99 N.M. 432, 433, 659 P.2d 318, 319 (Ct. App. 1983). In reviewing a motion to dismiss for failure to state a claim, the court takes the well pleaded facts alleged in the complaint as true and tests the legal sufficiency of the claims. *Hunnicutt v. Sewell*, 2009-NMCA-121, ¶8, 219 P.3d 529. To avoid dismissal for failure to state a claim, the pleadings must tell a story from which the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred. *Derringer v. State*, 2003-NMCA-073, ¶5, 68 P.3d 961, certiorari denied 133 N.M. 727, 69 P.3d 237. Further, facts subject to judicial notice may be considered in a Rule 12(B)(6) motion without converting the motion to dismiss into a motion for summary judgment. *Tal v. Hogan*, 453 F.3d 1244, 1271 (10th Cir. 2006). Lastly, questions of immunity are matters of law that are commonly reviewed on a motion to dismiss. See e.g., *Luboyeski v. Hill*, 117 N.M.

380, 872 P.2d 353 (1994); *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Assn.*, 2008-NMCA-143, ¶ 1, 145 N.M. 140, 194 P.3d 755.

a. Defendants request that this Court require more specificity.

As important issues of public policy exist in the case, *sub judice*, the Defendants urge the Court to require at least sufficient allegations to "tell the story" or connect the dots of the underlying complaint. See *Derringer*. The prime purpose of the New Mexico Rules of Civil Procedure is to eliminate delays resulting from reliance upon pure technicalities and generally to streamline and simplify procedure so that the merits of the case might be reached and the issues determined without lengthy or costly preparation for a trial on the merits, which trial might never be necessary. *Benson v. Export Equip. Corp.*, 49 N.M. 356, 360, 164 P.2d 380, 382 (N.M. 1945).

In a case such as this, where Plaintiff is seeking a large expansion of the existing waiver of immunity, the Court should not allow a mere notice pleading thst Defendants somehow harmed them while Defendants were inside a public building or using a public phone. The Plaintiff should be required to explain, in the Complaint, how the Defendant allegedly acted within the waivers provided under the Tort Claims Act (TCA). Accordingly, Defendants urge the Court to move away from a mere notice pleading requirement and require enough specificity such that Defendants know how the Plaintiff claims a waiver under the Act.

II. INTRODUCTION

Judge Sweazea of the Seventh Judicial District Court properly dismissed two counts of the Plaintiff's Complaint: first, Judge Sweazea dismissed Plaintiff's claim that dispatchers were law enforcement officers for purposes of NMSA § 41-4-12; next, he dismissed Plaintiff's claim that the use of the phone, absent any allegation of negligent operation of that phone, waived immunity under NMSA § 41-4-6. Judge Sweazea's decision is fully supported by law. Further, and of equal importance, his decision is strongly supported by public policy. Simplifying this issue substantially is the issue of the Enhanced 911 Act, which Appellant raised for the first time on appeal. The Enhanced 911 Act easily resolves this appeal and moots the remaining issues as it provides immunity for all transmittals of 911 calls.

Notwithstanding the Enhanced 911 Act, New Mexico case law makes clear that County dispatchers are not law enforcement officers. Precedent also illustrates that the mere use of a phone, absent any allegation of the misuse of that phone, is not sufficient to state a claim for the negligent operation of equipment. Plaintiff attempts to argue that simple personal negligence is waived merely because the dispatcher conveyed information over a phone. If the conveyance of information over a phone is sufficient to waive immunity, then the Tort Claims Act will provide no immunity as all modern governmental actors use phones and other modern communication devices for most every act they take. Such a ruling is not

in conformance with the legislative intent behind the Tort Claims Act's grant of immunity.

Judge Sweazea made the correct decision below on these issues and the opportunity for further briefing on appeal has only buttressed the arguments below. Accordingly, Appellees pray this Court affirm Judge Sweazea and uphold the dismissals.

III. PUBLIC POLICY SUPPORTS AFFIRMANCE OF THE DISTRICT COURT DECISION *SUB JUDICE*

Important public policy issues strongly support the affirmance of the District Court in this case. The ruling sought by Plaintiff would significantly expand government liability to the benefit of a parent that had repeatedly endangered or harmed her child[1]. Such an expansion could not come at a worse time for governmental budgets. Further, the results of the holding sought by the Plaintiff would provide a reward to parents that should not be allowed to recover under the circumstances.

a. New Mexico governments face significant budgetary shortages with no relief in sight.

"New Mexico's budget crunch for the coming fiscal year could be $190 million worse than previously thought,... state lawmakers will face a $450 million revenue shortfall for the fiscal year, starting next July 1, just to maintain the state's

[1] Nesbitt, L. (2007, November 8). Mom Wouldn't Flee Fire. *Mountain View Telegraph.*

current level of services."[2] "There have already been spending cuts in Santa Fe and at colleges and public schools around the state because of recession-triggered state revenue declines."[3] The incoming Secretary of Finance and Administration recently acknowledged, "every state program will be scrutinized to determine which are essential programs that we need to fund ... desirable programs that we hopefully can fund, and which programs we can no longer afford."[4]

In seeking to have the District Court's decision overturned, Plaintiff is requesting this Court to hold that the use of a telephone alone is sufficient use of equipment for purposes of the building and equipment exception to the New Mexico Tort Claims Act's grant of sovereign immunity under NMSA § 41-4-6. Such a holding would expand the boundaries of the Tort Claims Act past their logical limits and, in effect, would void the Tort Claims Act. Further, such a holding would be in contradiction to the public policy directive offered in NMSA § 41-4-2, wherein the legislature recognized, "the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done." NMSA § 41-4-2. The holding Plaintiff seeks would require all governmental actors to do more than required by law, which contradicts the public policy of the TCA.

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[2] Boyd, D. (2010, November 12). Richardson Drops Bomb. *Albuquerque Journal*.
[3] *Id.*
[4] Baker, D. (2010, November 13). Martinez Appoints Finance Secretary. *Albuquerque Journal*.

The Tort Claims Act is the Legislature's response to the overturning of general common-law sovereign immunity in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (N.M. 1975). By enacting the Tort Claims Act, the Legislature acted to limit the exposure of the government to tort claims, but provided limited exceptions in the Act. Not only would the rulings sought by Plaintiff be in direct contradiction to that legislative intent, they would also subject the State and other governmental entities to extreme liability at the time when they need the protection of the Tort Claims Act the most, to avoid fiscal failure. As illustrated *supra*, New Mexico governments are facing the largest deficits in history. In cases like this one, the government is not an omniscient source of endless revenues; it is just an intermediary of the public coffers. Accordingly, there are limited funds and the holdings sought by the Plaintiff, that conveying information over a telephone is a sufficient use of equipment to invoke NMSA § 41-4-6, would harm the public interests to the benefit the parents of a child that should not have been in their custody. Therefore, this Court should affirm the District Court ruling, not only because it is supported by law, but also because it is good public policy in a fiscally difficult time for public entities.

IV. PLAINTIFF'S CLAIM IS BARRED BY NMSA § 63-9D-10 WHICH PROVIDES IMMUNITY FOR "TRANSMITTING 911 CALLS".

This entire matter is easily resolved by the Enhanced 911 Act, 63-9D-l, *et seq*, which the Appellant has raised for the first time on appeal. As Torrance

County has an "enhanced" 911 system, the claim is not only barred by the Tort Claims Act, but is also barred by the Enhanced 911 Act. Plaintiff argues that the change in the Enhanced 911 Act in 2005, whereby the Legislature added the word "Enhanced" to various sections of the Act, including the immunity section, eliminates immunity for 911 system operators. The new language reads "the local governing body, public agency, equipment supplier, telecommunications company, commercial mobile radio service provider and their employees and agents are not liable for damages resulting from installing, maintaining or providing **enhanced** 911 systems NMSA § 63-9D-10 (emphasis added).

The current complete section on immunity states:

> Enhanced 911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for the public health, welfare and safety. In contracting for such services or the provisioning of an enhanced 911 system, except for willful or wanton negligence or intentional acts, the local governing body, public agency, equipment supplier, telecommunications company, commercial mobile radio service provider and their employees and agents are not liable for damages resulting from installing, maintaining or providing enhanced 911 systems or **transmitting 911 calls**.

Id. (emphasis added).

The statute was not amended to eliminate immunity for any older system but rather to prevent the argument that the new systems were somehow not included in the protection provided to the older systems. However, the legislative intent of the

statute is irrelevant to this Appeal as Torrance County has been on the Enhanced 911(E911) system since at least 1999. In 2005, the legislature amended the Act to recognize that most, if not all, of this state had converted to the E911 system; the most logical explanation for the amendment was to prevent the argument that the immunity provided to all 911 systems was somehow being lost by the use of new "equipment" at the 911 centers.

The Torrance County 911 system has been "Enhanced" for more than a decade. As illustrated in FN5, there is adequate authority for this Court to take judicial notice of the fact that the entire State of New Mexico has been on the enhanced 911 system since well before the incident described in the Complaint. Additionally, public policy urges the Court to use its powers to take judicial notice specifically because the Appellant raised this Act for the first time on appeal, claiming that it abrogated immunity for 911 dispatchers. Such an argument is in direct contradiction of the Act and Appellees should have the opportunity to offer facts subject to judicial notice in response to Appellant's new arguments. See Qwest Enhanced 9-1-1 Service Agreements dated 9/3/2002 and 4/7/1999.[5] See also

[5] This Court may take judicial notice of the fact that Torrance County has been on the Enhanced 911 system for more than a decade for a number of reasons. First, "Judicial notice may be taken at any stage of the proceeding." NMRA, Rule 11-201. Second, the Supreme Court recognized the ability of the Appellate Courts to take judicial notice for the first time on appeal. See *City of Aztec v. Gurule*, 2010-NMSC-006 228 P.3d 477. While the Court there recognized the ability of the Appellate Courts to take judicial notice of municipal laws for the first time on appeal, this Court "may take notice of whatever facts the [lower] court could have noticed judicially" *id.* at ¶10, because this Court is conducting a de novo review. Appellees recognize that there is some ambiguity in New Mexico Common Law regarding judicial notice of facts on appeal. However, Appellees urge this Court to adopt the holdings of the Tenth Circuit in this Area in light of the judicial efficiency and public policy arguments where Appellants
Continued on next page

the Torrance County Grant Agreements for E911 Service and Minutes of the Torrance County Commission Meetings from July 9, 2003[6]. Not only was Torrance County on the landline "enhanced system" no later than 1999, it was upgraded to the wireless system prior to 2007.[7] Further, the entire state was on the E911 system prior to the incidents complained of. See FN 7. In fact, Torrance County has gone out of its way to be at the forefront of E911 adoption.[8]

Public policy urges the Court to take judicial notice of the fact that the entire state was on E911 by 2007 and that Torrance County had been on E911 since 1999 as the alternative is to rule on issues that need not be decided as they are moot. It is

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raise their E911 argument for the first time on appeal, and the dispositive nature of the Act. The Tenth Circuit has construed Rule 201 to include the ability to take judicial notice on appeal. See *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1096 n. 1 (10th Cir.2004); *Bell v. Manspeaker*, 34 Fed.Appx. 637, 641 (10th Cir. April 10, 2002); *Slusher v. Furlong*, 29 Fed. Appx. 490, 493 n. 1, 2002 WL 12252, at *3 (10th Cir. Jan.4, 2002); *Pueblo of Sandia v. United States*, 50 F.3d 856, 861 n. 6 (10th Cir.1995) (court took judicial notice of government reports and documents not contained in record below). There is ample authority from the Tenth Circuit that Federal Rule 201(f), which reads identically to New Mexico's Rule, is applicable on appeal. See *U.S. v. Burch*, 169 F.3d 666, 671 (10th Cir. 1999)(holding "Judicial notice may be taken at any time, including on appeal. A fact may be judicially noticed if it is not subject to reasonable dispute because it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." As the attached Agreements are the Official Public Records of government action, this Court may take judicial notice of their contents under (2). Additionally, it is generally known that the enhanced 911 service, which sends address information to the operator, is in effect in New Mexico. See also *Metropolitan Creditors' Trust v. Pricewaterhousecoopers, LLP*, E.D.Wash.2006, 463 F.Supp.2d 1193 (Facts contained in public records are appropriate subjects of judicial notice.) and *U.S. ex rel. Dingle v. BioPort Corp.*, W.D.Mich.2003, 270 F.Supp.2d 968, affirmed 388 F.3d 209, certiorari denied 125 S.Ct. 1708, 544 U.S. 949, 161 L.Ed.2d 526 (Public records and government documents, including those available from reliable sources on the Internet, are subject to judicial notice.) "A court shall take judicial notice if requested by a party and supplied with the necessary information." NMRA, Rule 11-20. Lastly, the United States Supreme Court has recognized that it is duty of counsel to bring to the tribunal's attention, without delay, facts that may raise question of mootness so that unnecessary issues are not decided in moot appeals. *Arizonans for Off. English v. Arizona*, 520 U.S. 43 (1997).

[6] See *W. Old Town Neighborhood Ass'n v. City of Albuquerque*, 122 N.M. 495, 927 P.2d 529 (N.M. App. 1996)(holding that resolution can be the equivalent of ordinance.)

[7] See Hanh, B. (2005, May 26). Enhanced-911 Upgrade Coming. Albuquerque Journal. A courtesy copy is attached to this Brief as an addendum. Courts may take judicial notice of newspaper articles. *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995).

[8] See Mcclannahan, R. (2008, July 17). An Electronic Crumb Trail. Mountain View Telegraph. A courtesy copy is attached to this Brief as an addendum.

common knowledge that all New Mexico 911 systems provide caller identification information to the dispatcher, which is the only change in the move to an "enhanced system". Therefore, this Court may take judicial notice for a number of reasons.

The Court may affirm on alternate grounds that were not raised below when such affirmance is "fair to the appellant." *Williams v. Stewart*, 2005-NMCA-061, ¶22, 112 P.3d 281, 288. See also *DiMarco v. Presbyterian Healthcare Services, Inc.*, 2007-NMCA-053, ¶9, 160 P.3d 916, 919. Here, such an affirmance is "fair". The Appellant raised the Enhanced 911 Act, and the immunity provisions therein, for the first time on appeal. Appellant argues that the Act somehow abrogates immunity by including the word "enhanced". As the Appellant has made the Enhanced 911 Act and its applicability an issue in this appeal, this Court can fairly rule on the matter as it is conducting a de novo review. The alternative is a ruling that is unnecessary and a potential remand to be dismissed again some years from now based on the immunity provided by the Enhanced 911 Act. Such an outcome is contrary to the efficient use of judicial resources and goes against the policy of the New Mexico Appellate Courts avoiding deciding moot issues.

As such, the County and its employees and agents are immune from claims involving the "maintaining or providing enhanced 911 systems or transmitting 911 calls". *Id.* The claims dismissed by Judge Sweazea are exactly that. Therefore, this

Court should affirm on these alternate grounds and the remaining issues should be held to be moot; as moot, they need not be decided. *Gunaji v. Macias*, 2001-NMSC-028, 31 P.3d 1008.

V. THE USE OF THE PHONE TO FIELD A 911 CALL IS INSUFFICIENT TO STATE A CLAIM UNDER § 41-4-6

Plaintiff has not alleged any negligent use of equipment. Nor has Plaintiff alleged any physical or proximate link between the negligence and the injury. Plaintiff's argument ignores the fact that Diana Willis abandoned Richard Willis in the desert and seeks to argue that the Torrance County dispatchers are responsible for his death. Plaintiff cannot state a claim under NMSA § 41-4-6 without allegations of the negligent operation of equipment and physical causation of injuries. The ruling sought by the Plaintiff, under which the fact that a governmental phone was used to convey information is sufficient to waive immunity under the TCA, would eviscerate the meaning of the TCA and likely destroy sovereign immunity as the only allegation required would be that a public employee used public phones or other ancillary equipment without allegations of the negligent use of the equipment or a physical connection to the injury. Such a ruling is contrary to legislative intent. Accordingly, Judge Sweazea correctly dismissed Plaintiff's claims for the negligent operation of a building or equipment.

Plaintiff's Complaint contains no allegation of negligent operation of equipment. There is no allegation that any Defendant incorrectly operated the

equipment. Rather, the relevant allegation is "Defendants Arnold, Stack and Ledbetter breached their duty by negligently and recklessly failing to convey accurate information over dispatch channels, and by negligently failing to take any action subsequent to receiving Susan Cohn's call to ensure that Decedent's welfare was being determined. Such breach constituted negligence." Plaintiff's Complaint at ¶78. Such an allegation is not one of negligent operation of equipment; rather, it is an allegation of simple individual negligence, specifically the failure to convey information. The failure to convey information and the failure to take subsequent actions is not the negligent operation of equipment.

The legislative intent behind NMSA § 41-4-6 is to waive immunity when the government actor negligently operates the equipment which directly causes injury to the plaintiff; for example, if a governmental employee negligently drives a bulldozer into traffic causing a collision or negligently operates fire equipment in close proximity to a plaintiff. On appeal, Plaintiff has dropped the argument he raised at the District Court level that somehow a negligent building was involved and focused his entire argument on two points: that the Enhanced 911 Act somehow illustrates a waiver under the TCA and that *McCurry v. City of Farmington*, 97 N.M. 728, 643 P.2d 292 (N.M. App. 1982) stands for the proposition that the use of a phone waives sovereign immunity under NMSA § 41-4-6. Both arguments fail.

a. The Enhanced 911 Act provides immunity from exactly this claim.

NMSA § 63-9D-10 provides immunity for 911 dispatchers and governments that operate 911 systems. Plaintiff's argument is essentially that the Enhanced 911 Act illustrates that a phone is "equipment" for purposes of NMSA § 41-4-6 while simultaneously arguing that the Act's grant of immunity to governments for any liability resulting from the operation of the 911 system does not apply. Such an argument contradicts itself.

The Enhanced 911 Act, while specifically dealing with newer 911 systems, illustrates the Legislature's current intent to provide immunity to governments and dispatchers for the operation of the 911 system. Nothing in the Act supports the argument that the Act implies a waiver of immunity for older 911 systems. Further, only the Tort Claims Act can waive sovereign immunity. "A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act and by Sections 41-4-5 through 41-4-12 NMSA 1978." NMSA § 41-4-4(A). Therefore, additional immunity may be granted in other sections, but TCA sovereign immunity may not be abrogated anywhere except inside the TCA. As such, the Enhanced 911 Act may provide additional immunity but may not waive any immunity granted by the TCA.

Therefore, Plaintiff's argument that the Enhanced 911 Act illustrates a waiver of immunity fails.

b. The allegations in the Plaintiff's Complaint fail to illustrate any negligent operation of equipment.

NMSA § 41-4-6 only waives immunity for the negligent operation of equipment when the equipment causes the hazard which the plaintiff is exposed to. In *McCurry v. City of Farmington*, 97 N.M. 728, 643 P.2d 292 (N.M. App. 1982) this Court found that NMSA § 41-4-6 waived sovereign immunity under the TCA when firefighters deliberately burned vehicles and used firefighting equipment to extinguish the fires thereby creating a toxic hazard which physically injured the plaintiff. The Court recognized that the alleged negligence occurred "in close proximity" to the Plaintiff. *Id.* at 293. No case cited by the Plaintiff holds that proximity is not an element of a negligence claim brought under NMSA § 41-4-6. To the contrary, claims brought under NMSA § 41-4-6 require either presence on government managed lands or physical proximity to the negligent use of equipment.

Here, Plaintiff was not in any physical proximity to the equipment. Further, as illustrated *supra*, Plaintiff has not alleged any actual negligence in the operation of any equipment. Rather, Plaintiff has alleged the failure to convey information and the failure to take additional unknown actions. Such an allegation is not one of negligent operation of equipment, even if the phone is equipment. Specifically,

there is no allegation that any Defendant negligently "operated" the equipment. As Judge Sweazea correctly noted that the conveyance of information could just have easily occurred through a number of methods, including in person, and nothing about the alleged operation of the phone was negligent. Accordingly, Plaintiff has failed to state a claim under NMSA § 41-4-6.

c. Both public policy and legislative intent strongly support affirmation of Judge Sweazea's decision.

The desperate condition of public finances and the potential result of these parents recovering after the various acts they took towards Richard strongly support affirmance. Further, the expansion sought by Plaintiff would essentially hold that anytime a public employee picks up a phone (equipment), that employee has waived sovereign immunity under the TCA. Not only would that holding eviscerate the sovereign immunity provided by the TCA but it would provide a foothold for the argument that the use of any equipment, even a pencil, tied to a claim of simple negligence would be sufficient to state a claim under NMSA § 41-4-6. That holding would revisit *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (N.M. 1975) by, in effect, abolishing sovereign immunity as this Court recognized as a danger in *Martinez v. Kaune Corp.* when it held, "[i]mposing such liability would circumvent the very grant of immunity provided by the Tort Claims Act." *Martinez v. Kaune Corp.*, 106 N.M. 489, 492, 745 P.2d 714, 717 (N.M. Ct. App. 1987)(discussing the extension of NMSA § 41-4-6 in the context of food

manufacturing equipment). There is no conceivable act conducted by government today that does not involve the use of some "equipment". Computers, telecommunications, radios, and other modern equipment offer a slippery slope of potential attacks on the Tort Claims Act. Such a holding would make the already difficult public budget impossible. It would also harm the predictability of governmental reliance on the TCA to provide immunity and allow planning.

d. Claims under NMSA § 41-4-6 are limited to those claims occurring on property maintained by the government or in the immediate vicinity of governmental equipment.

Although § 41-4-6 has been construed in many forms, there is no case law that supports the argument offered by the Plaintiff. In fact, the logical conclusion of Plaintiff's argument is that the actions of any public employee acting with public machinery or equipment are waived by NMSA § 41-4-6, regardless of proximity to an actual plaintiff or alleged negligence in the operation of said equipment. That argument is not supported by New Mexico law. Plaintiff claims that the immunity for the dispatch center and the dispatchers is waived because they use public equipment even though there was no physical connection between the equipment and the injury. Further, there is no allegation that the Defendants negligently operated the equipment. Rather, the allegations are that the Defendants were simply negligent in their conveyance of information or subsequent personal inaction. If one were to follow Plaintiff's argument to its logical conclusion the use

of a public phone by any public employee could waive immunity for any damage allegedly caused by said employee in any public context. That holding, in a modern society, would use NMSA § 41-4-6 to abrogate sovereign immunity. In addition, such a holding would be contrary to New Mexico precedent which states that there is no waiver for negligent training or supervision without a specifically enumerated waiver under the TCA. The ruling the Plaintiff seeks would create an entirely new waiver under the TCA. A waiver of such broad scope would waive all alleged negligence where a public employee used any public equipment, regardless of if negligent maintenance or operation of the equipment was even involved. Such a ruling would stretch NMSA § 41-4-6 past its logical bounds and the legislative intent, as illustrated by the Enhanced 911 Act, *supra*.

The common theme of the NMSA § 41-4-6 case law is that the alleged negligence and the injury occur on the property or in the immediate vicinity of the equipment or machinery. The interpretation argued by the Plaintiff does not follow that precedent and would, in effect, abrogate all sovereign immunity.

Plaintiff cites various cases for his proposition that immunity is waived for the negligent operation of equipment or machinery regardless of the locale of the ultimate injury. However, the cases cited by Plaintiff do not stand for that proposition. Plaintiff's principal case is *McCurry v. City of Farmington*, 97 N.M. 728, 643 P.2d 292 (N.M. Ct. App. 1982). Plaintiff cited *McCurry* for the

proposition that immunity was waived for activities of firemen using trucks and equipment in a training exercise. There this Court held that the use of fire trucks and other equipment may be waived under NMSA § 41-4-6; however, the Court noted that the vehicles were burned and the equipment used was "in close proximity" to the plaintiff's workplace, which was the basis for the finding of a waiver of immunity. *Id.* at 729.

Contrary to the case law offered by the Plaintiff, New Mexico law illustrates that § 41-4-6 waives immunity when a danger to the public or a class of citizens is created on the grounds or in the immediate vicinity of the equipment or building. "Liability may also arise if negligent public employees operate or maintain a facility in such a way as to create an unsafe or dangerous condition on the property or in the immediate vicinity." *Leithead v. City of Santa Fe*, 1997-NMCA-041, 123 N.M. 353, 355, 940 P.2d 459, 461. In reviewing *Espinoza* and *Archibeque,* the Court of Appeals stated, "[t]hese cases stand for the proposition that to establish liability under the Act, it is not enough to show that public employees negligently supervised persons in their care and that the resulting injury occurred on public property." *Id.*at ¶7. The common theme is that there is a physical proximity to the negligent act and actual negligence in the operation of the equipment or building. In declining to extend NMSA § 41-4-6 to the inspection of food and food manufacturing, this Court recognized in *Martinez v. Kaune Corp.*, 106 N.M. 489,

745 P.2d 714 (N.M. Ct. App. 1987), that "[i]mposing such liability would circumvent the very grant of immunity provided by the Tort Claims Act." *Id.* at 492. (disapproved of on other grounds).

The operational or maintenance activities which may fall under Section § 41-4-6 include controlling ingress and egress to public buildings and grounds in a manner that allows vicious dogs, violent gang members, or improperly trained security guards to roam the premises and thereby pose a risk of injury to the general population occupying or visiting those premises. See, e.g., *Castillo v. County of Santa Fe*, 107 N.M. 204, 207, 755 P.2d 48, 51 (1988) (vicious dog roaming grounds of public housing project); *Callaway v. New Mexico Dept. of Corrections*, 117 N.M. 637, 642, 875 P.2d 393, 398 (Ct. App. 1994) (violent gang members in state correctional facilities); *Baca v. State*, 1996-NMCA-021, ¶ 10, 121 N.M. 395, 911 P.2d 1199 (improperly trained security guards on state-fair grounds). The waiver of immunity under NMSA § 41-4-6 also may extend to situations where a physical feature of the premises poses a risk of injury to the general public if left unguarded, as in the case of swimming pools frequented by children. See, e.g., *Leithead*, 1997-NMCA-041, ¶ 16; *Seal v. Carlsbad Indep. Sch. Dist.*, 116 N.M. 101, 105, 860 P.2d 743, 747 (1993).

However, the waiver of immunity in NMSA § 41-4-6 of the TCA is not construed so broadly as to encompass any negligent act or omission that happens to

occur when the governmental actor happens to use a phone associated with the County. Such a broad construction would violate the principle that "[s]tatutory provisions purporting to waive governmental immunity are strictly construed." *Rutherford v. Chaves County*, 2003-NMSC-010, ¶ 11, 133 N.M. 756, 69 P.3d 1199.

Thus, for example, the waiver of immunity under NMSA § 41-4-6 does not apply to negligence that arose from the duty to supervise children in a day-camp undertaking, rather than a duty to remedy a danger to the general public posed by the physical condition of the premises on which the day camp was operated. See *Espinoza*, 120 N.M. at 684, 905 P.2d at 722. NMSA § 41-4-6 also does not apply where the State undertakes a duty to monitor a family's treatment of children within a home (see *Johnson v. Holmes*, 377 F. Supp. 2d 1069, 1078-81 D.N.M. 2004), rather than a duty to ensure that the housing provided to the family is safe from physical defects. See *Cobos v. Dona Ana County Housing Auth.*, 1998-NMSC- 049, ¶ 20, 126 N.M. 418, 970 P.2d 1143. Similarly, there is no waiver of immunity under NMSA § 41-4-6 where the negligence attributed to the State arose from a duty to supervise schoolchildren's interaction with one another (see *Pemberton v. Cordova*, 105 N.M. 476, 478, 734 P.2d 254, 256 (Ct. App. 1987)), as opposed to a danger to the public posed by operation or maintenance of the school building itself. See *Williams v. Central Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 17,

124 N.M. 488, 952 P.2d 978. The aforementioned case law makes clear that Plaintiff's negligent supervision claims brought under § 41-4-6 fail.

As illustrated herein, the case law cited by Plaintiff, where NMSA § 41-4-6 is found to waive liability, always illustrates both a physical and a causal connection between the operation or maintenance of the building or equipment and the alleged damages. On the other hand, where plaintiffs have attempted to expand NMSA § 41-4-6 to cover negligent supervision or training without the requisite connection to the operation or maintenance of a building or equipment, the Courts have repeatedly held that NMSA § 41-4-6 will not waive immunity.

VI. THE TORRANCE COUNTY DISPATCHERS ARE NOT LAW ENFORCEMENT OFFICERS UNDER § 41-4-12

Not only did Judge Sweazea hold that the Torrance County Dispatchers were not law enforcement officers, but Judge Hansen in the Federal District Court for the District of New Mexico also has held that even Albuquerque Police Dispatchers were not law enforcement officers. See *Garrison v. Polisar, et al* No. CIV 96-1801 LH/DJS (D.N.M. March 12, 1999 J. Hansen) pgs 29-32[9] (*aff'd* on other grounds by *Garrison v. Polisar*, 229 F.3d 1163 (10th Cir. 2000), *cert denied* , 532 U.S. 994, 121 S. Ct. 1654, 149 L. Ed. 2d 637 (2001)). Both decisions were fully supported by New Mexico precedent.

[9] A courtesy copy of the opinion is included as an addendum to this Response Brief.

"[L]aw enforcement officer means a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, **whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes**, or members of the national guard when called to active duty by the governor." NMSA § 41-4-3 (emphasis added). Plaintiff's Brief argues that the Torrance County Dispatchers are law enforcement officers because they maintain public order. Such an argument is not supported by precedent or common knowledge and usage in language. Further, such arguments have been directly rejected by the New Mexico appellate Courts.

a. The dispatchers do not maintain public order.

When evaluating whether a defendant is a law enforcement officer under the maintenance of public order prong, New Mexico case law makes clear that the appropriate test is whether the majority of the defendant's duties, responsibilities, and activities are spent in activities traditionally performed by law enforcement officers in the common understanding of the word. See *Weinstein v. City of Santa Fe*, 121 N.M. 646, 916 P.2d 1313 (1996) and *Coyazo v. State*, 120 N.M. 47, 897 P.2d 234 (N.M. App. 1995). Here, Plaintiff's argument is highly analogous to the argument made in *Coyazo v. State*, 120 N.M. 47, 897 P.2d 234 (N.M. App. 1995). In *Coyazo*, the plaintiff invited this Court "to stretch the definition of 'law

enforcement officer' to include district attorneys in their prosecutorial role", using the argument that district attorneys maintain public order "by prosecuting criminals and deterring persons from criminal activity." *Id.* at 236. This Court reasoned that "a comparison must be drawn between the primary activities of the public employee in question and the normal, commonplace activities of, for example, a police officer on patrol or a detention facility guard engaged in handling prisoners on a day-to-day basis." *Id.* at 237. While this Court was careful not to limit the definition too much to allow for future expansions of what police and traditional law enforcement officers might do as the field of law enforcement advances, it held, "Applying this practical approach, it is clear that district attorneys and their staffs are not engaged in the same activities as the officer on patrol when involved in the judicial phase of the criminal process. *Id.* at 238.

Relying on *Coyazo* and other cases, Judge Hansen, in *Garrison, supra,* held

> "it is clear that APD radio dispatchers and 911 operators are not engaged in the same activities as the officer on patrol. Rather, their duties are more analogous to those of secretaries or administrative assistants and as such, they are not 'law enforcement officers.' See *Weinstein*, 121 N.M. at 650 n.2, 916 P.2d at 1317 n.2 ("[P]olice secretaries and couriers would not be considered law enforcement officers under the Act because their principal duties do not include making arrests or keeping the peace.").

Garrison at pgs. 31-32 (internal citation in original).

Other more recent authority further supports the argument that the County Dispatchers are not law enforcement officers. In *Dunn v. McFeeley*, this Court held that police crime technicians were not law enforcement officers:

> Ultimately such work helps in maintenance of public order by leading to the apprehension and conviction of the guilty and the exculpation of the innocent. But that connection is too indirect to satisfy the statutory definition. In interpreting the Tort Claims Act our appellate courts have repeatedly found that a connection to law enforcement activity, even being a member of the law-enforcement team, is insufficient by itself to make one a law enforcement officer; the person's duties must directly impact public order.

Dunn v. McFeeley, 1999-NMCA-084, 127 N.M. 513, 520, 984 P.2d 760, 767.

In another United States District of New Mexico case, Judge Smith held that an animal control officer was not a law enforcement officer. Judge Smith used the test this Court expounded in *Baptiste v. City of Las Cruces*, 115 N.M. 178, 848 P.2d 1105 (N.M.Ct.App.1993), holding:

> According to *Baptiste*, an animal control officer is a 'law enforcement officer' only if the majority of the animal control officer's time is devoted to the duties of maintaining public order. *Id.* at 181, 848 P.2d 1105. Second, insofar as a duty of an animal control officer involves maintaining public order, is the duty one traditionally performed by law enforcement officers? If the duty is not a traditional duty of law enforcement officers, it does not come within the meaning of 'maintaining public order' in the statutory definition of 'law enforcement officer.' *Id.* In short, in order to be a law enforcement officer within the statute Defendant 1) must maintain public order, meaning he must perform a

> traditional duty of law enforcement officers and 2) the majority of Defendant's time must be devoted to duties of maintaining public order.

Tate v. Fish, 347 F. Supp. 2d 1049, 1059 (D.N.M. 2004).

In *Fernandez v. Mora-San Miguel Elec. Co-op., Inc.*, 462 F.3d 1244, 1246 (10th Cir. 2006), the United States Court of Appeals for the Tenth Circuit held that the Chief Investigator for a District Attorney's Office was not a law enforcement officer under the New Mexico Tort Claims Act. The Court reasoned that the fact that the defendant had investigative duties was insufficient to establish him as a law enforcement officer for purposes of the TCA.

In *Johnson ex rel. Estate of Cano v. Holmes*, 377 F. Supp. 2d 1069 (D.N.M. 2004) *aff'd*, 455 F.3d 1133 (10th Cir. 2006) the District of New Mexico held that State adoption agency employees were not akin to law enforcement officers with respect to their handling of investigations into allegations of criminal abuse of an adopted child. There the reasoning was that the principal duties of employees were not traditional law enforcement functions. The Court held that the CYFD employees were not law enforcement officers, under the TCA relying on a long string of New Mexico case law:

> The statutory waiver of immunity for "law enforcement officers" requires, at this stage, the allegation that the person is a law enforcement officer as the statute defines that phrase. "Akin" to a law enforcement officer is, as a matter of law, insufficient to waive sovereign immunity under § 41-4-12 NMSA 1978. *See, e.g., Montes v.*

Gallegos, 812 F.Supp. 1165, 1172 (D.N.M.1992)(holding that mayor is not a law enforcement officer under Tort Claims Act, notwithstanding his statutory authority and obligation to exercise law enforcement functions); *Dunn v. McFeeley,* 1999-NMCA-084, ¶ 24, 127 N.M. 513, 984 P.2d 760, 767 (holding OMI Medical Investigator and crime laboratory technician are not law enforcement officers under the Tort Claims Act), *cert. denied,* 127 N.M. 389, 981 P.2d 1207 (1999); *Coyazo v. State,* 120 N.M. 47, 51, 897 P.2d 234, 238 (Ct.App.1995)(holding that the District Attorney and their staff are not law enforcement officers under § 41-4-3(D)); *Callaway v. New Mexico Department of Corrections,* 117 N.M. at 641, 875 P.2d at 397 (holding that correctional officers at penitentiary are not law enforcement officers under the Tort Claims Act, notwithstanding their statutory power to make arrests); *Dunn v. State ex rel. Taxation and Revenue Dep't,* 116 N.M. 1, 4, 859 P.2d 469, 472 (Ct.App.1993)(holding that Director of Motor Vehicle Division is not a law enforcement officer under Tort Claims Act, notwithstanding his statutory power to make arrests); *Vigil v. Martinez,* 113 N.M. 714, 721, 832 P.2d 405, 412 (Ct.App.1992)(holding that probation and parole officers are not law enforcement officers under Tort Claims Act); *Abalos v. Bernalillo County District Attorney's Office,* 105 N.M. at 560-61, 734 P.2d at 800-801 (holding that the District Attorney and their staff are not law enforcement officers under § 41-4-3(D) NMSA 1978); *Anchondo v. Corrections Department,* 100 N.M. 108, 111, 666 P.2d 1255, 1258 (1983)(holding that the Secretary of Corrections and the Warden of a state penitentiary are not law enforcement officer under Tort Claims Act); *Candelaria v. Robinson,* 93 N.M. 786, 790, 606 P.2d 196, 200 (Ct.App.1980)(holding that the District Attorney and their staff are not law enforcement officers under § 41-4-12 NMSA 1978).

Johnson ex rel. Estate of Cano v. Holmes, 377 F. Supp. 2d 1069, 1083 (D.N.M. 2004) aff'd, 455 F.3d 1133 (10th Cir. 2006).

Here, Defendants Arnold, Stack, and Ledbetter are not law enforcement officers under New Mexico law. The duties of the dispatchers do not include any primary activity such as "maintaining public order" by either the case law or the statutory definition. Plaintiff's Brief attempts to use a very similar argument to *Coyazo*, where the plaintiff claimed that a district attorney's role in maintaining public order was sufficient to make him a law enforcement officer for purposes of § 41-4-12. That argument failed there as it fails here; even Plaintiff's Brief recognized that the primary duties of a County Dispatcher is receiving calls and transmitting information. Nothing about those duties is even remotely similar to the traditional law enforcement duties such as patrolling and taking criminals into custody. Accordingly, as the case law clearly illustrates, the Torrance County Dispatchers are not law enforcement officers.

The Enhanced 911 Act's grant of immunity to 911 dispatchers specifically illustrates the legislative intent that 911 dispatchers are not waived from TCA protection.

> Enhanced 911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for the public health, welfare and safety. In contracting for such services or the provisioning of an enhanced 911 system, except for willful or wanton negligence or intentional acts, the local governing body, public agency, equipment supplier, telecommunications company, commercial mobile radio service provider and their employees and agents are not liable for damages resulting from

> installing, maintaining or providing enhanced 911 systems or **transmitting 911 calls.**

NMSA § 63-9D-10 (emphasis added).

The Enhanced 911 Act's grant of immunity illustrates the legislative intent regarding the status of dispatchers under the Tort Claims Act. Nothing in the Enhanced 911 Act illustrates any legislative intent to make any dispatcher subject to a waiver under the TCA; nor could the Legislature abrogate the immunity provided by the TCA without specifically modifying a specific waiver of immunity inside the TCA itself as the grant is a general grant with limited exceptions provided inside the Act only. The logical conclusion is that the legislature understood that dispatchers were not law enforcement officers under the TCA; the legislature likely wanted to preempt any potential arguments that the duties of dispatchers were somehow getting closer to those of law enforcement officers by the enhanced abilities of the new systems.

In conclusion, both the case law and the Enhanced 911 Act illustrate that dispatchers are not law enforcement officers and are not waived under the TCA. Dispatchers do not have duties and responsibilities similar to those of traditional law enforcement officers. The Enhanced 911 Act adds further evidence of the legislative intent with respect to the status of dispatchers under the TCA. Accordingly, the District Court correctly dismissed Plaintiff's claims based on dispatchers as law enforcement officers.

b. Additional discovery is unnecessary.

There is no factual issue that prevents dismissal under Rule 12 and affirmance of Judge Sweazea's decision. Plaintiff argues that factual issues need to be resolved through discovery before his claim could be dismissed under Rule 12. However, when taking all allegations in the Complaint as true, there is no allegation that opens the door to the possibility that county dispatchers might be law enforcement officers. As illustrated *supra*, there is sufficient case law to establish that the duties of a county dispatcher do not meet the test for law enforcement officers.

The case law cited at the District Court level relied on *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 273, 106 S. Ct. 2505, 2523, 91 L. Ed. 2d 202 (1986). That case and its Tenth Circuit progeny illustrate that the Plaintiff must illustrate what specific probable facts the Plaintiff suspects will be found and will prevent dismissal. See *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000).

Lastly, Defendants already responded to Plaintiff's initial written discovery including hundreds of pages of written production and answers. Nothing in any of that discovery, including the manuals and other materials from the dispatch center, lends support to the argument that the dispatchers are law enforcement officers.

Not only has Plaintiff not illustrated any probable facts that could be discovered that would make the dispatchers law enforcement officers, but such facts cannot exist when the dispatchers have no common law enforcement duties, a fact that is common knowledge. Further, the case law has developed significantly since the cases cited by the Plaintiff to support the argument that discovery is needed to determine whether dispatchers are law enforcement officers. Accordingly, the District Court correctly ruled that no discovery was required prior to ruling that county dispatchers were not law enforcement officers under the multitude of cases that limit the boundaries of the law enforcement officer category.

VII. CONCLUSION

This Court should affirm Judge Sweazea for many reasons. First, as Torrance County has been on the enhanced 911 system for more than a decade the Enhanced 911 Act immunizes the handling of 911 calls. That issue moots the remaining appellate issues. Second, Plaintiff's Complaint is devoid of allegations of the negligent operation of equipment; accordingly, the Tort Claims Act provides sovereign immunity for the stated claim. Third, Plaintiff's Complaint illustrates no physical connection between the alleged negligence and the injury. Fourth, dispatchers are not law enforcement officers.

Further supporting the argument for affirmance is strong public policy. There has never been a more dire situation in public budgets and the extreme expansion sought by the Plaintiff would cripple the public coffers at the time when they are most vulnerable. Such an expansion is not warranted in this case as the result would be to financially reward these parents. Lastly, Plaintiff has other remedies, including his negligent search claim and his other law enforcement claims still pending in the District Court.

As the Enhanced 911 Act easily resolves this issue Appellees respectfully request that this Court affirm Judge Sweazea on alternate grounds or, in the alternative, affirm his decision directly.

Respectfully Submitted by:

WALLIN & BRIONES LAW FIRM, LLC

By:_____

BRANDON HUSS
DENNIS K. WALLIN
8500 Menaul Boulevard NE
Suite A-200
Albuquerque, New Mexico 87112
(505) 246-0120
Attorneys for Defendants
Torrance County Board of
Commissioners, Sheriff Clarence
Gibson, Dorothy Gibson, Michael
Stack, James Ledbetter, and Deputy
John Doe

and

BEALL & BIEHLER

By: approved by email on 12/5/2010
Mary T. Torres
Attorneys for Defendant
Jeanine Arnold
6715 Academy NE
Albuquerque, NM 87109
505-828-3600
Fax: 505-828-3900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2010 the foregoing was served via United States Mail, postage prepaid, as required by 12-307 NMRA to the following:

James P. Sullivan
Christina L.G. Brennan
Brennan & Sullivan, P.A.
128 East De Vargas St.
Santa Fe, NM 87501

David J. Jaramillo
Maria E. Touchet
Gaddy ♦ Jaramillo
2025 San Pedro NE
Albuquerque, NM 87110

Rachel E. Higgins
509 Roma NW
Albuquerque, NM 87102

By: _____
Brandon Huss

ADDENDUM

Agreement Number: CDS-990121-0096

U S WEST ENHANCED 9-1-1 SERVICE AGREEMENT

This is an Agreement between **Torrance County E911 District** ("CUSTOMER") and **U S WEST Communications, Inc.** ("USWC"), for the provision of U S WEST Enhanced 911 (E911) Service ("Service").

1. SCOPE.

a. USWC shall provide and CUSTOMER shall pay for Service. Service to be provided under this Agreement is a telecommunications exchange service which routes 9-1-1 dialed calls to a Customer designated Public Safety Answering Point (PSAP). The number "9-1-1" is intended as a universal emergency telephone number which provides the public direct access to a PSAP. A PSAP is an agency authorized to receive and respond to emergency calls. One or more PSAPs may be required for any given municipality or metropolitan area. PSAPs are designated by the CUSTOMER and specified in Attachment(s) to this Agreement Service includes USWC network facilities necessary for the answering, transferring, and forced disconnect of emergency 9-1-1 calls originated by persons within the servicing area(s). USWC does not answer and forward 9-1-1 calls, but furnishes the use of its facilities to enable the CUSTOMER'S E9-1-1 personnel to respond to such calls.

b. USWC shall not provide service to less than an entire central office service area. Service does not include facilities provided by independent telephone companies and/or Competitive Local Exchange Carrier ("CLEC").

c. USWC shall provide Service up to the Standard Network Interface ("SNI") for each of the service locations at CUSTOMER's location(s). The SNI is that location where USWC's protected network facilities end and CUSTOMER's inside wire or network begins. USWC provides Service in accordance with the applicable Tariff, Price List, and/or Catalog ("Tariff") and shall be consistent with applicable state statutes, which govern Service in the state of New Mexico and are incorporated herein by this reference. Any conflict between this Agreement and the Tariff will be resolved in favor of the Tariff.

d. CUSTOMER shall use the E911 database provided by USWC only for answering and responding to E911 calls. CUSTOMER shall be responsible for ensuring that each PSAP shall also use the E911 database as prescribed herein. Any other use of the database will result in immediate termination of Service.

e. USWC ACCEPTS NO RESPONSIBILITY FOR OBTAINING OR FOR THE ACCURACY OF SUBSCRIBER, STATION, OR END-USER RECORD INFORMATION RECEIVED FROM INDEPENDENT TELEPHONE COMPANIES, CLECS, OR PRIVATE TELECOMMUNICATIONS SYSTEMS, SUCH AS PBX OR SHARED TENANT SERVICES.

2. **TERM.** This Agreement will commence on the latest signature date, provided mandatory filing requirements are met. This Agreement will remain in effect until terminated.

3. CHARGES AND BILLING.

a. CUSTOMER shall be billed the Tariff rates in effect for all Service monthly rate elements. These charges do not include applicable taxes imposed by law. USWC reserves the right to revise rates if a change in the statutes or administrative rules affects the cost of providing Service. CUSTOMER shall pay each bill in full by the payment due date on each bill. Where permitted by law, late payment charges shall be assessed according to Tariff, or law. The charges for Services under this Agreement, including any and all discounts to which CUSTOMER may be entitled, will be offered and charged to CUSTOMER independently from and regardless of the CUSTOMER's purchase of any customer premises equipment or enhanced services from USWC.

b. Provision of Service under this Agreement may involve independent telephone company territories. Charges for Service only include Service provided within USWC territory up to the meet point of the independent telephone company and/or CLEC. Other charges which involve work performed by the independent telephone company and/or CLEC will be in addition to USWC's charges and will be negotiated separately between CUSTOMER and the independent telephone company and/or CLEC.

c. CUSTOMER may add Service under this Agreement at the Tariff rates and charges in effect at the time of the addition(s).

4. **TERMINATION.** Either party may terminate this Agreement by providing the other party thirty (30) days written notice of termination.

5. **PERSONAL INJURY; PROPERTY DAMAGE.** Each party will be responsible for any actual, physical damages it directly causes in the course of its performance under this Agreement, limited to damages resulting from personal injuries, death, or property damage arising from negligent acts or omissions; PROVIDED, HOWEVER, THAT NEITHER PARTY WILL BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR SPECIAL DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT.

6. **LIMITATION OF LIABILITY.** USWC WILL NOT BE LIABLE TO CUSTOMER FOR ANY INCIDENTAL, INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT. EXCEPT AS PROVIDED IN THIS AGREEMENT, ANY USWC LIABILITY TO CUSTOMER FOR ANY DAMAGES OF ANY KIND UNDER THIS AGREEMENT WILL NOT EXCEED, IN AMOUNT, A SUM EQUIVALENT TO THE APPLICABLE OUT-OF-SERVICE CREDIT. REMEDIES UNDER THIS AGREEMENT ARE EXCLUSIVE AND LIMITED TO THOSE EXPRESSLY DESCRIBED IN THIS AGREEMENT. IN ADDITION TO THE LIMITATIONS STATED IN SECTIONS 1, 5, AND 7 HEREIN, USWC SHALL NOT BE LIABLE FOR ANY DAMAGE THAT RESULTS FROM INFORMATION PROVIDED TO CUSTOMER BY ANY OTHER DATA PROVIDER(S).

7. **NO WARRANTIES.** THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. IF USWC INTEGRATES ANY RECORDS PROVIDED TO USWC BY ANY OTHER DATA PROVIDER, FOR INCLUSION IN THE CUSTOMER'S E911 DATA, USWC MAKES NO REPRESENTATION OR WARRANTY AND ASSUMES NO LIABILITY REGARDING THE ACCURACY OF THE DATA PROVIDED BY ANY OTHER DATA PROVIDER.

8. **UNCONTROLLABLE CONDITIONS.** Neither party will be deemed in violation of this Agreement if it is prevented from performing any of the obligations under this Agreement by reason of severe weather and storms; earthquakes or other natural occurrences; strikes or other labor unrest; power failures; nuclear or other civil or military emergencies; acts of legislative, judicial, executive or administrative authorities; or any other circumstances which are not within its reasonable control.

9. **LAWFULNESS.** This Agreement and the parties' actions under this Agreement shall comply with all applicable federal, state, and local laws, rules, regulations, court orders, and governmental agency orders. Any change in rates, charges or regulations mandated by the legally constituted authorities will act as a modification of any contract to that extent without further notice. This Agreement shall be governed by the laws of the state where Service is provided.

10. **DISPUTE RESOLUTION.**

a. Other than those claims over which a regulatory agency has exclusive jurisdiction, all claims, regardless of legal theory, whenever brought and whether between the parties or between one of the parties to this Agreement and the employees, agents or affiliated businesses of the other party, shall be resolved by arbitration. A single arbitrator engaged in the practice of law and knowledgeable about telecommunications law shall conduct the arbitration in accordance with the then current rules of the American Arbitration Association ("AAA").

b. All expedited procedures prescribed by the AAA shall apply. The arbitrator's decision shall be final and binding and judgment may be entered in any court having jurisdiction thereof.

c. Other than the determination of those claims over which a regulatory agency has exclusive jurisdiction, federal law (including the provisions of the Federal Arbitration Act, 9 U.S.C. Sections 1-16) shall govern and control with respect to any issue relating to the validity of this Agreement to arbitrate and the arbitrability of the claims.

d. If any party files a judicial or administrative action asserting claims subject to arbitration, and another party successfully stays such action and/or compels arbitration of such claims, the party filing the action shall pay the other party's costs and expenses incurred in seeking such stay or compelling arbitration, including reasonable attorney's fees.

11. **GENERAL PROVISIONS.**

a. Failure or delay by either party to exercise any right, power, or privilege hereunder, will not operate as a waiver hereto.

b. This is a retail end user contract. It may be assigned only with the consent of USWC. It may not be assigned to a reseller or a telecommunications carrier under any circumstances.

c. This Agreement benefits CUSTOMER and USWC. There are no third party beneficiaries.

d. This Agreement constitutes the entire understanding between CUSTOMER and USWC with respect to Service provided herein and supersedes any prior agreements or understandings.

The parties hereby execute and authorize this Agreement as of the latest date shown below:

Torrance County E911 District	**U S WEST Communications, Inc.**
Shirley Whatley	
Authorized Signature	Authorized Signature
Shirley Whatley	
Printed Name	Printed Name
911 Director	
Title	Title
April 7, 1999	
Date	Date

Notices:

751 Salt Mission Trails
McIntosh, New Mexico
ATTN:

201 3rd Street NW, Suite 606, Box 1355
Albuquerque, New Mexico 87102
ATTN: Maria Martinez

ATTACHMENT 1

PSAP INFORMATION:

SERVICE LOCATION: 751 Salt Mission Trails, McIntosh, New Mexico
BILLING NUMBER: N-505-384-3032

The central offices and CUSTOMER PSAP locations included in this Attachment are as follows:

Central Offices:

USWC CENTRAL OFFICE	NXX	INDEPENDENT TELEPHONE COMPANY AND/OR CLEC CENTRAL OFFICES	NXX
Estancia Main	384		
Moriarty Main	832		
Mountainair Main	847		

Central Office Addresses:

Estancia Main, 411 N Allen Ave, Estancia, NM
Moriarty Main, 111 Broadway, Moriarty, NM
Mountainair Main, 106 N Roosevelt Ave, Mountainair, NM

PSAPs:

Torrance County E911 District

ATTACHMENT 2

Charges for Service:

Total Monthly Recurring Charge: $789.97
Total Nonrecurring Charge: $N/A

Agreement Number NUM-020702-0048
Billing Number

QWEST ENHANCED 9-1-1 SERVICE AGREEMENT

This is an agreement between Torrance County ("Customer") and Qwest Corporation ("Qwest"), formerly known as U S WEST Communications, for the provision of Qwest Enhanced 911 (E911) Service ("Service") as defined herein ("Agreement"). Throughout this Agreement, Qwest and Customer may individually be referred to as "Party" and collectively as "Parties". All attachments are incorporated herein by this reference.

1. SCOPE.

1.1. Qwest shall provide and Customer shall pay for Service. Service to be provided under this Agreement is a telecommunications exchange service which routes 9-1-1 dialed calls to a Customer designated Public Safety Answering Point (PSAP). The number "9-1-1" is intended as a universal emergency telephone number which provides the public direct access to a PSAP. A PSAP is an agency authorized to receive and respond to emergency calls. One or more PSAPs may be required for any given municipality or metropolitan area. PSAPs are designated by the Customer and specified in Attachment(s) to this Agreement Service includes Qwest network facilities necessary for the answering, transferring, and forced disconnect of emergency 9-1-1 calls originated by persons within the servicing area(s). Qwest does not answer and forward 9-1-1 calls, but furnishes the use of its facilities to enable the Customer's E9-1-1 and/or 9-1-1 personnel to respond to such calls.

1.2. Qwest shall not provide Service to less than an entire central office service area. Service does not include facilities provided by independent telephone companies and/or Competitive Local Exchange Carrier ("CLEC").

1.3. Qwest shall provide Service up to the Standard Network Interface ("SNI") for each of the service locations at Customer's location(s). The SNI is that location where Qwest's protected network facilities end and Customer's inside wire or network begins. Qwest provides Service in accordance with the applicable Tariff, Price List, and/or Catalog ("Tariff") and shall be consistent with applicable state statutes, which govern Service in the State of New Mexico, and are incorporated herein by this reference. Any conflict between this Agreement and the Tariff will be resolved in favor of the Tariff.

1.4. Customer shall use the E911 database provided by Qwest only for answering and responding to E911 calls. Customer shall be responsible for ensuring that each PSAP shall also use the E911 database as prescribed herein. Any other use of the database will result in immediate termination of Service.

1.5. QWEST ACCEPTS NO RESPONSIBILITY FOR OBTAINING OR FOR THE ACCURACY OF SUBSCRIBER, STATION, OR END-USER RECORD INFORMATION RECEIVED FROM INDEPENDENT TELEPHONE COMPANIES, CLECS, OR PRIVATE TELECOMMUNICATIONS SYSTEMS, SUCH AS PBX OR SHARED TENANT SERVICES.

2. TERM.

2.1. This Agreement will commence on the latest signature date, provided mandatory filing requirements are met. The term of this Agreement will expire twelve (12) months from the first installation date of Service (as evidenced by Qwest's records). **Or** the date of [enter effective date of renewal].

2.2. Should Qwest continue to provide Service after this term without a further agreement, the Service charges will convert to the applicable month-to-month rate under the terms and conditions of the applicable Tariff.

2.3. The minimum service period for rate stabilized Service is twelve (12) months.

2.4. Customer may enter into a new Service agreement that establishes a greater available term period without incurring non-recurring or termination charges.

3. CHARGES AND BILLING.

3.1. Customer shall be billed the Tariff rates in effect for all Service monthly rate elements. These charges do not include applicable taxes and/or surcharges imposed by law. Qwest reserves the right to revise rates if a change in the statutes or administrative rules affects the cost of providing Service. Customer shall pay each bill in full by the payment due date on each bill. Where permitted by law, late payment charges shall be assessed according to Tariff, or law. The charges for Services under this Agreement, including any and all discounts to which Customer may be entitled, will be offered and charged to Customer independently from and regardless of the Customer's purchase of any customer premises equipment or enhanced services from Qwest.

3.2. Provision of Service under this Agreement may involve independent telephone company territories. Charges for Service only include Service provided within Qwest territory up to the meet point of the independent telephone company and/or CLEC. Other charges which involve work performed by the independent telephone company and/or CLEC will be in addition to Qwest's charges and will be negotiated separately between Customer and the independent telephone company and/or CLEC.

3.3. Customer may add Service under this Agreement at the Tariff rates and charges in effect at the time of the addition(s).

4. TERMINATION.

4.1. Either party may terminate this Agreement for cause provided written notice specifying the cause for termination and requesting correction within thirty (30) days is given the other party and such cause is not corrected within such thirty (30) day period. Cause is any material breach of the terms of this Agreement. If Qwest terminates this Agreement for cause, or if Customer terminates this Agreement WITHOUT cause, Customer shall pay termination charges. If termination is prior to installation of Service, termination charges shall be those reasonable costs incurred by Qwest through the date of termination. If termination is after installation of Service but prior to the twelve (12) month minimum service period, Customer shall pay the twelve (12) month minimum service charge in addition to the termination charges specified in Tariff and/or in this Agreement.

4.2. If Customer discontinues Service to a level that is less than 80% of a total annual true-up stabilized monthly rate, a termination charge may apply to the Service removed below the 80% level. The charge shall be equal to one-hundred percent (100%) of the monthly rate for the Service terminated below the 80% level multiplied by the number of months, or portion thereof, remaining in the minimum service period; plus fifteen percent (15%) of the monthly rate for Service removed below the 80% level multiplied by the number of months, or portion thereof, remaining in the term of this Agreement. The Tariff may include additional terms and conditions regarding waiver of the early termination charge.

4.3. A termination charge will be waived when the Customer discontinues Service(s) and ALL of the following conditions are met: 1) Customer signs a service agreement for any other Qwest provided new service(s). All applicable nonrecurring charges will be assessed for the new service(s); 2) Both the current Service and the new service(s) are provided solely by Qwest; 3) The order to discontinue Service and the order to establish new service(s) are received by Qwest within thirty (30) days of each other for service in New Mexico, and at the same time for service in any other state; 4) The new service(s) installation must be completed within thirty (30) calendar days of the disconnection of Service, unless such installation delay is caused by Qwest; 5) The total value of the new service(s), excluding any special construction charges, is equal to or greater than one hundred fifteen percent (115%) of the remaining value of this Agreement; 6) A new Minimum Service Period, if applicable, will go into effect when the new service(s) agreement term begins; and, 7) Customer agrees to pay any previously billed, but unpaid recurring, and any outstanding nonrecurring charges - these charges cannot be included as part of the new service(s) agreement.

4.4. New service is defined as a newly installed service placed under a new service agreement(s), or newly installed additions to an existing service agreement(s), but does not include renewals of expiring service agreement(s), renegotiations of existing service agreement(s) and conversions from month-to-month service to contracted service.

5. PERSONAL INJURY; PROPERTY DAMAGE. Each party will be responsible for any actual, physical damages it directly causes in the course of its performance under this Agreement, limited to damages resulting from personal injuries, death, or property damage arising from negligent acts or omissions; PROVIDED, HOWEVER, THAT NEITHER PARTY WILL BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR SPECIAL DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT.

6. LIMITATION OF LIABILITY. QWEST WILL NOT BE LIABLE TO CUSTOMER FOR ANY INCIDENTAL, INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT. EXCEPT AS PROVIDED IN THIS AGREEMENT, ANY QWEST LIABILITY TO CUSTOMER FOR ANY DAMAGES OF ANY KIND UNDER THIS AGREEMENT WILL NOT EXCEED, IN AMOUNT, A SUM EQUIVALENT TO THE APPLICABLE OUT-OF-SERVICE CREDIT. REMEDIES UNDER THIS AGREEMENT ARE EXCLUSIVE AND LIMITED TO THOSE EXPRESSLY DESCRIBED IN THIS AGREEMENT. IN ADDITION TO THE LIMITATIONS STATED IN SECTIONS 1, 5, AND 7 HEREIN, QWEST SHALL NOT BE LIABLE FOR ANY DAMAGE THAT RESULTS FROM INFORMATION PROVIDED TO CUSTOMER BY ANY OTHER DATA PROVIDER(S).

7. NO WARRANTIES. THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. IF QWEST INTEGRATES ANY RECORDS PROVIDED TO QWEST BY ANY OTHER DATA PROVIDER, FOR INCLUSION IN THE CUSTOMER'S E911 DATA, QWEST MAKES NO REPRESENTATION OR WARRANTY AND ASSUMES NO LIABILITY REGARDING THE ACCURACY OF THE DATA PROVIDED BY ANY OTHER DATA PROVIDER.

8. UNCONTROLLABLE CONDITIONS. Neither party will be deemed in violation of this Agreement if it is prevented from performing any of the obligations under this Agreement by reason of severe weather and storms; earthquakes or other natural occurrences; strikes or other labor unrest; power failures; nuclear or other civil or military emergencies; acts of legislative, judicial, executive or administrative authorities; or any other circumstances which are not within its reasonable control.

9. LAWFULNESS. This Agreement and the parties' actions under this Agreement shall comply with all applicable federal, state, and local laws, rules, regulations, court orders, and governmental agency orders. Any change in rates, charges or regulations mandated by the legally constituted authorities will act as a modification of any contract to that extent without further notice. This Agreement shall be governed by the laws of the state where Service is provided.

10. DISPUTE RESOLUTION.

10.1. Other than those claims over which a regulatory agency has exclusive jurisdiction, all claims, regardless of legal theory, whenever brought and whether between the parties or between one of the parties to this Agreement and the employees, agents or affiliated businesses of the other party, shall be resolved by arbitration. A single arbitrator engaged in the practice of law and knowledgeable about telecommunications law shall conduct the arbitration in accordance with the then current rules of the American Arbitration Association ("AAA").

10.2. All expedited procedures prescribed by the AAA shall apply. The arbitrator's decision shall be final and binding and judgment may be entered in any court having jurisdiction thereof.

10.3. Other than the determination of those claims over which a regulatory agency has exclusive jurisdiction, federal law (including the provisions of the Federal Arbitration Act, 9 U.S.C. Sections 1-16)

shall govern and control with respect to any issue relating to the validity of this Agreement to arbitrate and the arbitrability of the claims.

10.4. If any party files a judicial or administrative action asserting claims subject to arbitration, and another party successfully stays such action and/or compels arbitration of such claims, the party filing the action shall pay the other party's costs and expenses incurred in seeking such stay or compelling arbitration, including reasonable attorney's fees.

11. GENERAL PROVISIONS.

11.1. Failure or delay by either party to exercise any right, power, or privilege hereunder, will not operate as a waiver hereto.

11.2. This is a retail end user contract. It may be assigned only with the consent of Qwest. Customer may not assign to a reseller or a telecommunications carrier under any circumstances.

11.3. This Agreement benefits Customer and Qwest. There are no third party beneficiaries.

11.4. This Agreement constitutes the entire understanding between Customer and Qwest with respect to Service provided herein and supersedes any prior agreements or understandings.

11.5. Neither Party shall, without the prior written consent of the other Party: (a) issue any press release or make any other public announcement regarding this Agreement or any relation between Customer and Qwest; or (b) us the name, trademarks or other proprietary identifying symbol of the other Party or its affiliates. Such consent by Qwest may be given only by Qwest's Corporate Communications Department and any purported consent by any other person, including any Qwest sales or customer service representative, is void and of no effect.

11.6 Neither party shall, without the prior written consent of the other party, disclose or use (except as expressly permitted by, or required to achieve the purposes of, this Agreement) the Confidential Information of the other party, during the Term of this Agreement and for one (1) year following the expiration or termination hereof. Such consent by Qwest may be given only by Qwest's Corporate Legal Department and any purported consent by any other person, including any Qwest sales or customer service representative, is void and of no effect. For purposes of this section, Confidential Information shall include, but not be limited to, the terms (including pricing) and existence of this Agreement; provided, however, either party may disclose the existence of this Agreement (but none of its terms) as may be reasonably necessary by such party in order to conduct its business. Each party will take reasonable precautions to protect the other party's Confidential Information, using at least the same standard of care as it uses to maintain the confidentiality of its own confidential information. The receiving party may disclose Confidential Information if required by a governmental agency, by operation of law, or if necessary in any proceeding to establish rights or obligations under this Agreement, provided that the receiving party gives the disclosing party reasonable prior written notice sufficient to permit the disclosing party an opportunity to contest such disclosure.

12. EXECUTION. The Parties hereby execute and authorize this Agreement as of the latest date shown below. Notices concerning this Agreement may be sent to Qwest's Customer billing address of record or to Customer's Address for Notices specified herein, if any.

	Qwest Corporation
Authorized Signature	Authorized Signature
Name Typed or Printed	Name Typed or Printed
Title	Title
Date	Date
Address for Notices:	Address for Notices:

ATTACHMENT 1

PSAP INFORMATION:

SERVICE LOCATION: 751 Salt Mission Trails, McIntosh, New Mexico

BILLING NUMBER: N-505-384-3032

The central offices and Customer PSAP locations included in this Attachment are as follows:

Central Offices:

QWEST CENTRAL OFFICE	NXX	INDEPENDENT TELEPHONE COMPANY AND/OR CLEC CENTRAL OFFICES	NXX

Central Office Addresses: **PSAPs:**

ATTACHMENT 2

Charges for Service: $917.00

Torrance County Board of County Commissioners

Commission Room **Torrance County Courthouse**

Regular Meeting
July 9, 2003 - 9:00 A.M.

Agenda

Call To Order
Pledge of Allegiance
Invocation
Approval of Minutes: June 25, 2003
Approval of Meeting Agenda
Approval of Consent Agenda

1. Animal Control Department & Shelter Report – Joe Kaberlein & Phil Salazar
2. Animal Shelter Board Appointment
3. Job Description for Animal Shelter Manager
4. Animal Control Ordinance Possibilities and Direction
5. Alternate Representative to the Board of Directors for MRGCOG
6. Esperanza Clinic Project Time Line
7. 10:00 AM – Public Hearing – Zone Change to Special Use for Mining Sand, Dirt, Gravel & Rock – Mountainair Concrete
8. Resolution 2003-20 – Adoption of the Comprehensive Plan (Final Revision)
9. Demolition Contractors – EVSWA – Joseph Ellis
10. Cleanup Fund – EVSWA – Joseph Ellis
11. E911 Project 03-E-13 Grant Agreement
12. E911 Project 03-T-13 Grant Agreement
13. E911 Project 03-W-13 Grant Agreement
14. Amendment No. 7 – E911 Grant No. 92-E-NR-J-10-G-13
15. Amendment No. 6 – E911 Grant No. 92-T-NR-J-12-N-13
16. Mileage & Per Diem Act Designation
17. 2003-04 Operating Budget

Executive Session, pursuant to 10-15-H regarding limited personnel matters, pending litigation, purchase acquisition and disposal of real property.

CONSENT AGENDA

Approval of Vouchers/Approval of Indigent Claims

STATE OF NEW MEXICO
DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION
ENHANCED 9-1-1 GRANT PROGRAM

GRANT AGREEMENT AMENDMENT NO. 7

Name of Grantee: County of Torrance Grant No. 92-E-NR-J-10-G-13

Date: June 30, 2003 Equipment Grant: [X]

The grant agreement for the above-referenced grant is amended as follows:

Term of Agreement	[X]
Budget Revision	[ ]
Scope of Service Revision	[ ]

Article II - Consideration and Method of Payment

A. In consideration of the Grantee's satisfactory operation of the 911 system, all terms of the original, and any amendments thereto, the Division shall terminate this grant on June 30, 2003.

E. All payments will be made by the Division on behalf of the Grantee to the telephone company or equipment vender who is on a State Price Agreement; or reimbursement will be made to the Grantee for actual costs upon receipt by the Division of a completed Request for Payment Form, or an invoice certified correct by the Grantee and/or the Division for the E-911 equipment, equipment maintenance, and upgrades billed by the equipment provider.

Article IV - Certification

The Grantee hereby assures and certifies that it will comply with all requirements with respect to the acceptance and use of State funds.

IN WITNESS WHEREOF, the Grantee and the Division do hereby execute this Grant Amendment as of the date first written above.

THIS GRANT AMENDMENT has been approved by:

GRANTEE

Mayor, County Commission Chairman, Association President — 7-9-03 Date

Chester Riley Jr.
(Type or Print Name)

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

The foregoing instrument was acknowledged before me this 9th day of July, 2003 by Chester Riley Jr.

Notary Public

My Commission Expires: 5-14-05

DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION

By: David A. Ruiz, Director — 6-26-03 Date

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

The foregoing instrument was acknowledged before me this 26 day of June, 2003 by David A. Ruiz

Notary Public

My Commission Expires: 3/29/04

Revised 8-27-98

NEW MEXICO E-911 PROGRAM

Exhibit C

EQUIPMENT
PROJECT COST/FINANCING SUMMARY

Local Government Division

Department of Finance and Administration

I. A. Grantee:	County of Torrance	II. Payment Computation	Equipment	Network & Database
B. Address:	P.O. Box 449	A. Grant Award:	$621,490.30	
	Mcintosh, New Mexico 87032	III. Orginal Grant Date:	August 7, 1992	
C. Telephone:	505-384-9831	IV. Project No's.:	92-E-NR-J-10-G-13	
		V. Grant Amended [	June 30, 2003	

Budget Line Items — **911 Equipment Fund**

V. 911 System Equipment			Totals	Date	Number of Months	Line Item Total
1. Equipment		$189,571.99				$189,571.99
2. Installation & Tax		$26,946.75		8-7-92		$26,946.75
3. Additional Equipment		$10,000.00		6-6-96		$10,000.00
4. System Reconfiguration		$231,732.00		5-27-97		$231,732.00
5. Year 2000 Upgrades		$31,153.00		7-30-98		$31,153.00
6. Equip Upgrades (UPS)		$26,308.00		6-12-01		$26,308.00
Equipment Total:			**$515,711.74**			
3. Maintenance/Lease	Monthly	Annual				
8-1-93 through 7-31-94		$5,064.00			12	$5,064.00
8-1-94 through 7-31-95	$413.00	$5,064.00			12	$5,064.00
8-1-95 through 7-31-96	$486.21	$5,064.00			12	$5,064.00
8-1-96 through 6-30-97	$486.21	$5,086.00		8-7-92	12	$5,086.00
7-1-97 through 6-30-98	$486.00	$5,832.00		7-30-98	12	$5,832.00
7-1-98 through 6-30-01	$486.00	$17,496.00		7-30-98		$17,496.00
Additional. Maintenance.		$21,047.00		6-6-96		$21,047.00
Spare Equipment		$21,000.00		6-6-96		$21,000.00
7-1-01 through 6-30-02	$532.00	$6,384.00		4-18-01	12	$6,384.00
7-1-02 through 6-30-03	$558.60	$6,703.20		4-18-01	12	$6,703.20
7-1-03 through 6-30-04	$586.53	$7,038.36		4-18-01	12	$7,038.36
Maintenance Total:			**$105,778.56**			
					Grant Total:	**$621,490.30**

STATE OF NEW MEXICO
DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION
ENHANCED 9-1-1 GRANT PROGRAM

GRANT AGREEMENT

Project No. **03-W-13**

THIS GRANT AGREEMENT made and entered into as of this **1st** day of **July, 2003**, by and between the Department of Finance and Administration, State of New Mexico, acting through the Local Government Division, Bataan Memorial Building, Suite 201, Santa Fe, New Mexico 87503, hereinafter called the **DIVISION**, and the **County of Torrance**, hereinafter called the **GRANTEE**.

WITNESSETH:

WHEREAS, this Grant Agreement is made by and between the Department of Finance and Administration, State of New Mexico, acting through the Local Government Division, and the Grantee, pursuant to the authority in Sections 63-9D-1 et. seq. NMSA 1978, as amended, and the Enhanced 911 Regulations 10 NMAC 6.2 which may be cited as the "Enhanced 911 Act" and the "911 Regulations."

WHEREAS, an enhanced 911 telephone emergency system is necessary to expand the benefits of the basic 911 emergency telephone number, to achieve a faster response time which minimizes the loss of life, property, provides automatic routing to the appropriate emergency response unit, provides immediate visual display of the location and telephone number of the caller and curtails abuses of the emergency system by documenting callers.

WHEREAS, the Grantee has the authority, pursuant to Section 63-9D-1 et. Seq. NMSA 1978 and the 911 Regulations to enter into this Grant Agreement and complies with the definition of "Grantee" in Section 7.21 of the 911 Regulations.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

ARTICLE I - LENGTH OF GRANT AGREEMENT

A. The term of this Grant Agreement shall be from **July 1, 2003**, through **June 30, 2007** and **SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE GRANTEE AND THE DIVISION**.

B. In the event that, due to unusual circumstances, it becomes apparent that this Grant Agreement cannot be brought to full completion within the time period set forth in Paragraph A above, the Grantee shall so notify the Division in writing at least thirty (30) days prior to the termination date of this Grant Agreement, in order that the Grantee and the Division may review the work accomplished to date and determine whether there is need or sufficient justification to amend this Grant Agreement to provide additional time for completion of the same. The Division's decision is final and non-appealable.

ARTICLE II - REPORTS

Annual Reports: The Grantee shall submit to the Division an Annual Status Report. The report shall include a description of any problems encountered, and any such other information as may be of assistance to the Division in its evaluation. The Annual Report shall include sufficient detail to evaluate the effectiveness of the 911 equipment and services provided by the equipment vendor and shall be submitted no later than June 1st, annually.

ARTICLE III - CONSIDERATION AND METHOD OF PAYMENT

A. In consideration of the Grantee's satisfactory completion of all work and services required to be performed under the terms of this Grant Agreement, and in compliance with all other Grant Agreement requirements herein stated, the Division shall pay the Grantee a sum not to exceed **$348,165.00**. The funds are to be expended in accordance with the proposed Revenue/Expenditure summary, attached as Exhibit "C", and made a part hereof and in accordance with the 911 Regulations Section 21, Disbursement of Funds and Section 16.1 Eligible Costs. It is understood and agreed that the Grantee's expenditure of these monies shall not deviate from the line items of said budget without the prior written approval of the Division and the funds shall not be expended for Ineligible Costs, Section 16.2, 911 Regulations.

B. The funds mentioned in Paragraph A above shall constitute full and complete payment of monies to be received by the Grantee from the Division.

C. It is understood and agreed that should any portion of the funds paid hereunder by the Division to the Grantee for the purpose designated herein remain unexpended after all conditions of this Grant Agreement have been satisfied, the unexpended funds shall revert to the Division for disposition.

D. Payments may be made on a reimbursement or actual cost basis upon receipt by the Division of a certification by the Grantee that payment was made, a copy of the invoice(s), and a copy of the warrant payment of the invoice(s).

E. Payments will not be made to the Grantee for work not specified in the Grant Agreement or in violation of the 911 Regulations.

ARTICLE IV - MODIFICATION, TERMINATION AND MERGER

A. The Division, by written notice to the Grantee, shall have the right to terminate this Grant Agreement if, at any time, in the judgment of the Division, the provisions of this Grant Agreement or the 911 Regulations have been violated or the activities described in the Project Description do not progress satisfactorily. If this Grant Agreement is so terminated, the Division may demand refund of all or part of the funds dispersed to the Grantee. The Division's decisions to terminate the Grant Agreement and demand refund are final and non appealable.

B. Modifications of terms and conditions of the Grant Agreement may only be made in writing by both the Grantee and the Division.

C. This Grant Agreement incorporates all agreements, covenants and understandings between the parties hereto concerning the subject matter hereof and all such agreements, covenants and understandings have been merged into this written Grant Agreement. No prior agreements, covenants, or understandings oral or otherwise, of the parties or their agents shall be valid and enforceable unless embodied in this Grant Agreement.

ARTICLE V - CERTIFICATION

The Grantee hereby assures and certifies that it will comply with the Enhanced 911 Act, the 911 Regulations, and other state laws, regulations, policies, guidelines, and requirements with respect to the acceptance and use of State funds. Also, the Grantee gives assurances and certifies with respect to the Grant that:

A. It has the legal authority to receive and expend the funds as described in this Grant Agreement.

B. It will comply with the New Mexico Procurement Code, Section 13-1-99 through 13-1-128 NMSA 1978.

C. It will adhere to all financial and accounting requirements of the Department of Finance and Administration.

D. It will comply with all requirements prescribed by the Division in its 911 Regulations, or other guidelines and procedures in relation to receipt and use of State Enhanced 9-1-1 Grant Funds.

E. It shall not at any time utilize or convert any equipment or property acquired or developed pursuant to this Agreement for other than the uses specified, without the prior written approval of the Division.

F. It will finance any amount exceeding the approved funding for the 911 equipment costs.

G. It will not make any changes in the 911 system configuration without first submitting a written request to the Division and obtaining the Division's written approval of the proposed change(s).

H. It will provide all the necessary qualified personnel, material, and facilities to run the 911 emergency reporting center.

ARTICLE VI - RETENTION OF RECORDS

The Grantee shall keep and preserve such records as will fully disclose the amount and disposition of the total funds from all sources budgeted for a period of six years from the termination of the Grant Agreement, the purpose of undertaking for which such funds were used, the amount and nature of all contributions from other sources, and such other records as the Division shall prescribe.

ARTICLE VII - GRANTEE REPRESENTATIVE

The Grantee hereby designates the person listed below as the official Grantee Representative responsible for overall supervision of the approved project.

Name: Ms. Shirley Whatley

Address: 751 Salt Missions Trail

McIntosh, NM 87032-0449

Title: PSAP Manager

Telephone: 505-384-9631

Fax: 505-348-9635

IN WITNESS WHEREOF, the Grantee and the Division do hereby execute this Grant Amendment as of the date first written above.

THIS GRANT AMENDMENT has been approved by:

GRANTEE

Chester Riley Jr. — 7-9-03

Mayor, County Commission Chairman, Association President — Date

Chester Riley Jr.
(Type or Print Name)

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

The foregoing instrument was acknowledged before me this 9th day of July 2003 by Chester Riley Jr.

Mary Lou Sedillo
Notary Public

My Commission Expires: 5-14-05

DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION

By: _____ 6-26-03

David A. Ruiz, Director — Date

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

The foregoing instrument was acknowledged before me this 26 day of June, 2003 by David A. Ruiz.

Claudette D. Estes
Notary Public

My Commission Expires: 3/29/04

Revised 6-19-033

NEW MEXICO E-911 PROGRAM

Exhibit C

WIRELESS GRANT
PROJECT COST / FINANCING SUMMARY

Exhibit C

Local Government Division

Department of Finance and Administration

I. A. Grantee:	County of Torrance	II. Payment Computation		Wireless
B. Address:	751 Salt Missions Trail	A. Grant Award:		$348,165.00
	McIntosh, NM 87032-0449	III. Grant Dates:		July 1, 2003
C. Telephone:	505-384-9631	IV. Project No's.:		03-W-13
		V. Amended Grant Date:		

911 Network and Database Fund

Budget Line Items					Line Item Total
E911 Wireless					
E911 Equipment	$281,089.00				$281,089.00
		Monthly	Annually	Number of Months	
Wireless E911 Trunks	Recurring 7-1-03 through 6-30-07	$320.00	$3,840.00	48	$15,360.00
Installation	$3,716.00				$3,716.00
Wireless Cost Recovery	Recurring 7-1-03 through 6-30-07	$1,000.00	$12,000.00	48	$48,000.00
				Grant Total	$348,165.00

STATE OF NEW MEXICO
DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION
ENHANCED 9-1-1 GRANT PROGRAM

GRANT AGREEMENT

Project No. **03-T-13**

THIS GRANT AGREEMENT made and entered into as of this **1st** day of **July, 2003**, by and between the Department of Finance and Administration, State of New Mexico, acting through the Local Government Division, Bataan Memorial Building, Suite 201, Santa Fe, New Mexico 87503, hereinafter called the **DIVISION**, and the **County of Torrance**, hereinafter called the **GRANTEE**.

WITNESSETH:

WHEREAS, this Grant Agreement is made by and between the Department of Finance and Administration, State of New Mexico, acting through the Local Government Division, and the Grantee, pursuant to the authority in Sections 63-9D-1 et. seq. NMSA 1978, as amended, and the Enhanced 911 Regulations 10 NMAC 6.2 which may be cited as the "Enhanced 911 Act" and the "911 Regulations."

WHEREAS, an enhanced 911 telephone emergency system is necessary to expand the benefits of the basic 911 emergency telephone number, to achieve a faster response time which minimizes the loss of life, property, provides automatic routing to the appropriate emergency response unit, provides immediate visual display of the location and telephone number of the caller and curtails abuses of the emergency system by documenting callers.

WHEREAS, the Grantee has the authority, pursuant to Section 63-9D-1 et. Seq. NMSA 1978 and the 911 Regulations to enter into this Grant Agreement and complies with the definition of "Grantee" in Section 7.21 of the 911 Regulations.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

ARTICLE I - LENGTH OF GRANT AGREEMENT

A. The term of this Grant Agreement shall be from **July 1, 2003**, through **June 30, 2007** and **SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE GRANTEE AND THE DIVISION.**

B. In the event that, due to unusual circumstances, it becomes apparent that this Grant Agreement cannot be brought to full completion within the time period set forth in Paragraph A above, the Grantee shall so notify the Division in writing at least thirty (30) days prior to the termination date of this Grant Agreement, in order that the Grantee and the Division may review the work accomplished to date and determine whether there is need or sufficient justification to amend this Grant Agreement to provide additional time for completion of the same. The Division's decision is final and non-appealable.

ARTICLE II - REPORTS

Annual Reports: The Grantee shall submit to the Division an Annual Status Report. The report shall include a description of any problems encountered, and any such other information as may be of assistance to the Division in its evaluation. The Annual Report shall include sufficient detail to evaluate the effectiveness of the 911 equipment and services provided by the equipment vendor and shall be submitted no later than June 1st, annually.

ARTICLE III - CONSIDERATION AND METHOD OF PAYMENT

A. In consideration of the Grantee's satisfactory completion of all work and services required to be performed under the terms of this Grant Agreement, and in compliance with all other Grant Agreement requirements herein stated, the Division shall pay the Grantee a sum not to exceed **$316,980.00**. The funds are to be expended in accordance with the proposed Revenue/Expenditure summary, attached as Exhibit "C", and made a part hereof and in accordance with the 911 Regulations Section 21, Disbursement of Funds and Section 16.1 Eligible Costs. It is understood and agreed that the Grantee's expenditure of these monies shall not deviate from the line items of said budget without the prior written approval of the Division and the funds shall not be expended for Ineligible Costs, Section 16.2, 911 Regulations.

B. The funds mentioned in Paragraph A above shall constitute full and complete payment of monies to be received by the Grantee from the Division.

C. It is understood and agreed that should any portion of the funds paid hereunder by the Division to the Grantee for the purpose designated herein remain unexpended after all conditions of this Grant Agreement have been satisfied, the unexpended funds shall revert to the Division for disposition.

D. Payments may be made on a reimbursement or actual cost basis upon receipt by the Division of a certification by the Grantee that payment was made, a copy of the invoice(s), and a copy of the warrant payment of the invoice(s).

E. Payments will not be made to the Grantee for work not specified in the Grant Agreement or in violation of the 911 Regulations.

ARTICLE IV - MODIFICATION, TERMINATION AND MERGER

A. The Division, by written notice to the Grantee, shall have the right to terminate this Grant Agreement if, at any time, in the judgment of the Division, the provisions of this Grant Agreement or the 911 Regulations have been violated or the activities described in the Project Description do not progress satisfactorily. If this Grant Agreement is so terminated, the Division may demand refund of all or part of the funds dispersed to the Grantee. The Division's decisions to terminate the Grant Agreement and demand refund are final and non appealable.

B. Modifications of terms and conditions of the Grant Agreement may only be made in writing by both the Grantee and the Division.

C. This Grant Agreement incorporates all agreements, covenants and understandings between the parties hereto concerning the subject matter hereof and all such agreements, covenants and understandings have been merged into this written Grant Agreement. No prior agreements, covenants, or understandings oral or otherwise, of the parties or their agents shall be valid and enforceable unless embodied in this Grant Agreement.

ARTICLE V - CERTIFICATION

The Grantee hereby assures and certifies that it will comply with the Enhanced 911 Act, the 911 Regulations, and other state laws, regulations, policies, guidelines, and requirements with respect to the acceptance and use of State funds. Also, the Grantee gives assurances and certifies with respect to the Grant that:

A. It has the legal authority to receive and expend the funds as described in this Grant Agreement.

B. It will comply with the New Mexico Procurement Code, Section 13-1-99 through 13-1-128 NMSA 1978.

C. It will adhere to all financial and accounting requirements of the Department of Finance and Administration.

D. It will comply with all requirements prescribed by the Division in its 911 Regulations, or other guidelines and procedures in relation to receipt and use of State Enhanced 9-1-1 Grant Funds.

E. It shall not at any time utilize or convert any equipment or property acquired or developed pursuant to this Agreement for other than the uses specified, without the prior written approval of the Division.

F. It will finance any amount exceeding the approved funding for the 911 equipment costs.

G. It will not make any changes in the 911 system configuration without first submitting a written request to the Division and obtaining the Division's written approval of the proposed change(s).

H. It will provide all the necessary qualified personnel, material, and facilities to run the 911 emergency reporting center.

ARTICLE VI - RETENTION OF RECORDS

The Grantee shall keep and preserve such records as will fully disclose the amount and disposition of the total funds from all sources budgeted for a period of six years from the termination of the Grant Agreement, the purpose of undertaking for which such funds were used, the amount and nature of all contributions from other sources, and such other records as the Division shall prescribe.

ARTICLE VII - GRANTEE REPRESENTATIVE

The Grantee hereby designates the person listed below as the official Grantee Representative responsible for overall supervision of the approved project.

Name: Ms. Shirley Whatley

Address: 751 Salt Missions Trail

McIntosh, NM 87032-0449

Title: PSAP Manager

Telephone: 505-384-9631

Fax: 505-348-9635

IN WITNESS WHEREOF, the Grantee and the Division do hereby execute this Grant Amendment as of the date first written above.

THIS GRANT AMENDMENT has been approved by:

GRANTEE

Chester Riley Jr. 7-9-03

Mayor, County Commission Chairman, Association President — Date

Chester Riley Jr.
(Type or Print Name)

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

The foregoing instrument was acknowledged before me this 9th day of July 2003 by Chester Riley Jr.

Tracy Lea Sedillo
Notary Public

My Commission Expires: 3-14-05

DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION

By: _____ 6-26-03

David A. Ruiz, Director — Date

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

The foregoing instrument was acknowledged before me this 26 day of June, 2003 by David A. Ruiz

Gwendolyn D. Gallo
Notary Public

My Commission Expires: 3/29/04

Revised 6-19-033

NEW MEXICO E-911 PROGRAM

Exhibit C

NETWORK AND DATABASE GRANT
PROJECT COST / FINANCING SUMMARY

Exhibit C

Local Government Division

Department of Finance and Administration

I. A. Grantee:	County of Torrance	II. Payment Computation	Equipment	Network & Database
B. Address:	751 Salt Missions Trail	A. Grant Award:		$316,980.00
	McIntosh, NM 87032-0449	III. Grant Dates:		July 1, 2003
C. Telephone:	505-384-9631	IV. Project No's.:		03-T-13
		V. Amended Grant Date:		

Budget Line Items

911 Network and Database Fund

E911 Network and Database		Monthly	Annually	Number of Months	Line Item Total
Qwest	Recurring: 7-1-03 through 6-30-07	$745.00	$8,940.00	48	$35,760.00
	Non-recurring: $15,000.00				$15,000.00
Western Telephone	Recurring: 7-1-03 through 6-30-07	$1,450.00	$17,400.00	48	$69,600.00
	Non-recurring: $15,000.00				$15,000.00
Valley Telephone Co.	Recurring: 7-1-01 through 6-30-04	$205.00	$2,460.00	48	$9,840.00
	Non-recurring: $15,000.00				$15,000.00
Recurring GIS Costs:	Recurring: 7-1-03 through 6-30-07	$910.00	$10,920.00	48	$43,680.00
Installation GIS Lines	$5,600.00				$5,600.00
Network & Database	$100,000.00				$100,000.00
Training	$7,500.00				$7,500.00
				Grant Total	**$316,980.00**

STATE OF NEW MEXICO
DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION
ENHANCED 9-1-1 GRANT PROGRAM

GRANT AGREEMENT

Project No. **03-E-13**

THIS GRANT AGREEMENT made and entered into as of this **1st** day of **July, 2003**, by and between the Department of Finance and Administration, State of New Mexico, acting through the Local Government Division, Bataan Memorial Building, Suite 201, Santa Fe, New Mexico 87503, hereinafter called the **DIVISION**, and the **County of Torrance**, hereinafter called the **GRANTEE**.

WITNESSETH:

WHEREAS, this Grant Agreement is made by and between the Department of Finance and Administration, State of New Mexico, acting through the Local Government Division, and the Grantee, pursuant to the authority in Sections 63-9D-1 et. seq. NMSA 1978, as amended, and the Enhanced 911 Regulations 10 NMAC 6.2 which may be cited as the "Enhanced 911 Act" and the "911 Regulations."

WHEREAS, an enhanced 911 telephone emergency system is necessary to expand the benefits of the basic 911 emergency telephone number, to achieve a faster response time which minimizes the loss of life, property, provides automatic routing to the appropriate emergency response unit, provides immediate visual display of the location and telephone number of the caller and curtails abuses of the emergency system by documenting callers.

WHEREAS, the Grantee has the authority, pursuant to Section 63-9D-1 et. Seq. NMSA 1978 and the 911 Regulations to enter into this Grant Agreement and complies with the definition of "Grantee" in Section 7.21 of the 911 Regulations.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

ARTICLE I - LENGTH OF GRANT AGREEMENT

A. The term of this Grant Agreement shall be from **July, 1 2003**, through **June 30, 2007** and **SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE GRANTEE AND THE DIVISION.**

B. In the event that, due to unusual circumstances, it becomes apparent that this Grant Agreement cannot be brought to full completion within the time period set forth in Paragraph A above, the Grantee shall so notify the Division in writing at least thirty (30) days prior to the termination date of this Grant Agreement, in order that the Grantee and the Division may review the work accomplished to date and determine whether there is need or sufficient justification to amend this Grant Agreement to provide additional time for completion of the same. The Division's decision is final and non-appealable.

ARTICLE II - REPORTS

Annual Reports: The Grantee shall submit to the Division an Annual Status Report. The report shall include a description of any problems encountered, and any such other information as may be of assistance to the Division in its evaluation. The Annual Report shall include sufficient detail to evaluate the effectiveness of the 911 equipment and services provided by the equipment vendor and shall be submitted no later than June 1st, annually.

ARTICLE III - CONSIDERATION AND METHOD OF PAYMENT

A. In consideration of the Grantee's satisfactory completion of all work and services required to be performed under the terms of this Grant Agreement, and in compliance with all other Grant Agreement requirements herein stated, the Division shall pay the Grantee a sum not to exceed **$311,307.00**. The funds are to be expended in accordance with the proposed Revenue/Expenditure summary, attached as Exhibit "C", and made a part hereof and in accordance with the 911 Regulations Section 21, Disbursement of Funds and Section 16.1 Eligible Costs. It is understood and agreed that the Grantee's expenditure of these monies shall not deviate from the line items of said budget without the prior written approval of the Division and the funds shall not be expended for Ineligible Costs, Section 16.2, 911 Regulations.

B. The funds mentioned in Paragraph A above shall constitute full and complete payment of monies to be received by the Grantee from the Division.

C. It is understood and agreed that should any portion of the funds paid hereunder by the Division to the Grantee for the purpose designated herein remain unexpended after all conditions of this Grant Agreement have been satisfied, the unexpended funds shall revert to the Division for disposition.

D. Payments may be made on a reimbursement or actual cost basis upon receipt by the Division of a certification by the Grantee that payment was made, a copy of the invoice(s), and a copy of the warrant payment of the invoice(s).

E. Payments will not be made to the Grantee for work not specified in the Grant Agreement or in violation of the 911 Regulations.

ARTICLE IV - MODIFICATION, TERMINATION AND MERGER

A. The Division, by written notice to the Grantee, shall have the right to terminate this Grant Agreement if, at any time, in the judgment of the Division, the provisions of this Grant Agreement or the 911 Regulations have been violated or the activities described in the Project Description do not progress satisfactorily. If this Grant Agreement is so terminated, the Division may demand refund of all or part of the funds dispersed to the Grantee. The Division's decisions to terminate the Grant Agreement and demand refund are final and non appealable.

B. Modifications of terms and conditions of the Grant Agreement may only be made in writing by both the Grantee and the Division.

C. This Grant Agreement incorporates all agreements, covenants and understandings between the parties hereto concerning the subject matter hereof and all such agreements, covenants and understandings have been merged into this written Grant Agreement. No prior agreements, covenants, or understandings oral or otherwise, of the parties or their agents shall be valid and enforceable unless embodied in this Grant Agreement.

ARTICLE V - CERTIFICATION

The Grantee hereby assures and certifies that it will comply with the Enhanced 911 Act, the 911 Regulations, and other state laws, regulations, policies, guidelines, and requirements with respect to the acceptance and use of State funds. Also, the Grantee gives assurances and certifies with respect to the Grant that:

A. It has the legal authority to receive and expend the funds as described in this Grant Agreement.

B. It will comply with the New Mexico Procurement Code, Section 13-1-99 through 13-1-128 NMSA 1978.

C. It will adhere to all financial and accounting requirements of the Department of Finance and Administration.

D. It will comply with all requirements prescribed by the Division in its 911 Regulations, or other guidelines and procedures in relation to receipt and use of State Enhanced 9-1-1 Grant Funds.

E. It shall not at any time utilize or convert any equipment or property acquired or developed pursuant to this Agreement for other than the uses specified, without the prior written approval of the Division.

F. It will finance any amount exceeding the approved funding for the 911 equipment costs.

G. It will not make any changes in the 911 system configuration without first submitting a written request to the Division and obtaining the Division's written approval of the proposed change(s).

H. It will provide all the necessary qualified personnel, material, and facilities to run the 911 emergency reporting center.

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Name: Ms. Shirley Whatley

Address: 751 Salt Missions Trail

McIntosh, NM 87032-0449

Title: PSAP Manager

Telephone: 505-384-9631

Fax: 505-348-9635

IN WITNESS WHEREOF, the Grantee and the Division do hereby execute this Grant Amendment as of the date first written above.

THIS GRANT AMENDMENT has been approved by:

GRANTEE

Chester Riley Jr. — 7-9-03

Mayor, County Commission Chairman, Association President — Date

Chester Riley Jr.
(Type or Print Name)

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

The foregoing instrument was acknowledged before me this 9th day of July 2003 by Chester Riley Jr.

Tracy Lea Sedillo
Notary Public

My Commission Expires: 5-14-05

DEPARTMENT OF FINANCE AND ADMINISTRATION
LOCAL GOVERNMENT DIVISION

By: _____ — 6-26-03

David A. Ruiz, Director — Date

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

The foregoing instrument was acknowledged before me this 26 day of June, 2003 by David A. Ruiz

Claudette D. Gallegos
Notary Public

My Commission Expires: 3/29/04

Revised 6-19-033

NEW MEXICO E-911 PROGRAM

Exhibit C

EQUIPMENT GRANT
PROJECT COST / FINANCING SUMMARY

Local Government Division

Department of Finance and Administration

I. A. Grantee:	County of Torrance	II. Payment Computation	Equipment	Network & Database
B. Address:	751 Salt Missions Trail	A. Grant Award:	$311,307.00	
	McIntosh, NM 87032-0449	III. Original Grant Date:	July 1, 2003	
C. Telephone:	505-384-9631	IV. Project No's.:	03-E-13	
		V. Amended Grant Date:		

Budget Line Items	911 Equipment Fund					
					Number of Months	Line Item Total
System Equipment		$253,859.00				$253,859.00
Spares Equipment		$25,000.00				$25,000.00
E911 Equip Maintenance			Monthly	Annual	Number of Months	
	Recurring 7-1-03 through 6-30-07		$676.00	$8,112.00	48	$32,448.00
					Grant Total:	$311,307.00

FINAL COPY
TORRANCE COUNTY BOARD OF COMMISSIONERS
REGULAR COMMISSION MEETING
July 9, 2003

COMMISSIONERS PRESENT: Chester Riley-Chairman
Paul "Tito" M. Chavez-Member
James Frost-Member

OTHERS PRESENT: Bob Ayre-County Manager
Tracy Sedillo-Assist. Manager
Christie Riley-Payroll

CALL TO ORDER:

Mr. Riley called the meeting to order at 9:00 am. Mr. Riley welcomes everyone present to the meeting.

APPROVAL OF MINUTES:

Mr. Riley asks if there are any additions, deletions or corrections to the June 25, 2003 regular commission meeting minutes. **ACTION TAKEN:** Mr. Chavez moved to approve the June 25, 2003 regular commission meeting minutes. Mr. Frost seconds the motion. **MOTION CARRIED.**

APPROVAL OF MEETING AGENDA:

Mr. Riley asked if there are any additions or deletions to the meeting agenda. **ACTION TAKEN:** Mr. Frost moved to approve the meeting agenda. Mr. Chavez seconds the motion. **MOTION CARRIED**

APPROVAL OF CONSENT AGENDA:

ACTION TAKEN: Mr. Chavez moved to approve the consent agenda. Mr. Frost seconds the motion. **MOTION CARRIED.**

1. ANIMAL CONTROL DEPARTMENT & SHELTER REPORT – JOE KABERLEIN AND PHIL SALAZAR

Mr. Richard Ledbetter introduced Mr. Kaberlein to the commissioners. Mr. Ledbetter gave the commissioners a brief overview of last month kennel activities. Mr. Ledbetter stated that were 38 animals picked up or taken to the shelter, 26 were put down, 11 were adopted and 7 are still in the shelter. They handled 50 calls. Mr. Ayre stated that they are doing a great job and 30% of what is coming in being adopted is a great start. Mr. Ayre said he and Mr. Frost attended the Moriarty City Council meeting last night and the budget issues were not resolved. Discussion only. **NO ACTION TAKEN:**

2. ANIMAL SHELTER BOARD APPOINTMENT

Mr. Ayre stated that Mr. Douglas Johnston former County Commissioner has volunteered for this appointment. Discussion followed. **ACTION TAKEN**: Mr. Frost moved to appoint Mr. Douglas Johnston to the Animal Shelter Board. Mr. Chavez seconds the motion. **MOTION CARRIED.**

3. JOB DESCRIPTON FOR ANIMAL SHELTER MANAGER

Mr. Ayre asked to table item #3 until the next meeting. **ACTION TAKEN**: Mr. Chavez moved to approve table item #3. Mr. Frost seconds the motion. **MOTION CARRIED.**

4. ANIMAL CONTROL ORDINANCE POSSIBLITIES AND DIRECTION

Mr. Ayre stated we have received a copy of the Edgewood's Ordinance and will give a copy to all commissioners to study. This ordinance is just the beginning we will have to have two public hearings. Mr. Ayre said he would like the county to model our ordinance as closely to Edgewood's as possible. The rural issue of course will have to be a little different from the Municipality. We need uniformity throughout the county so all animals will be kept the same amount of time. Discussion only. **NO ACTION TAKEN.**

5. ALTERNATE REPRESENTATIVE TO THE BOARD OF DIRECTORS FOR MRGCOG

Mr. Ayre stated he has been acting as the MRGCOG representative for the county but there is an alternate position. Pat Lincoln volunteered for the alternate position. Discussion followed. **ACTION TAKEN.** Mr. Frost moved to appoint Pat Lincoln as an alternate for the MRGCOG Board. Mr. Chavez seconds the motion. **MOTION CARRIED**

6. ESPERANZA CLINIC PROJECT TIME LINE

Mr. Ayre presented to the commissioners the time line for the Esperanza Clinic from Nims, Calvani & Associates. Time line hereto attached. Mr. Riley asked Mr. Ayre to call Nims, Calvani & Associates and get the project started, the time line is fine. Discussion only. **NO ACTION TAKEN**

8. RESOLUTION 2003-20 ADOPTION OF THE COMPREHENSIVE PLAN (FINAL REVISION)

Mr. Ayre asked the commissioners if they could table this resolution until the next meeting, as he took the comprehensive plan to the Moriarty City Council last night and he would like their input on the plan. Discussion followed. **ACTION TAKEN**: Mr. Chavez moved to table this resolution for two weeks until Moriarty City Council has a chance to look at it. Mr. Frost seconds the motion. **MOTION CARRIED**

9. DEMOLITION CONTRACTORS – EVSWA – JOSEPH ELLIS

Mr. Ellis presented to the commissioners a letter concerning the cost for demolition contractors and clean up fund. Letter hereto attached. Mr. Ellis stated they had contacted several contractors with heavy equipment that are willing to do the demolition on Ordinance sited properties. We have prepared a letter so property owners will know whom to contact. The contractors are Joe Barela, Stan Henson and Chris Valdez. If a landowner is cited they can contact these contractors do the demolition and disposal. Mr. Ellis said the other issue is, as Richard Ledbetter cites people, can fine money be used, brought to the county and put into a fund to clean up illegal dumping? We have discussed this with Magistrate Judge, Steve Jones, the indication was that when it comes to the actual point of a fine the money has to go to the State. However if the compliance officer in citing this individual suggests that a remitter be paid to the county in lieu of a fine and or some community service hours, that proposal could be presented to the Judge and maybe accepted favorable in lieu of legal action against the individual. Mr. Arye stated we are working on the process of how we can receive that money. Discussion Only. **NO ACTION TAKEN.**

10. CLEANUP FUND – EVSWQ – JOSEPH ELLIS

Item #10 was covered in item #9.

7. 10:00 AM – PUBLIC HEARING – ZONE CHANGE TO SPECIAL USE FOR MINING SAND, DIRT, GRAVEL & ROCK – MOUNTAINAIR CONCRETE

Dave Pettingill presented a letter to the commissioners. Letter hereto attached. Mr. Pettingill stated he was asked by Larry Stefan to prepare a letter to state his water use for the special use permit. Mr. Pettingill stated that they have no plans for washing any material. The only water we are going to need will be for restroom facilities and drinking purposes. In the future if I decide to put in a wash plant I will apply for all required permits. Discussion followed. **ACTION TAKEN.** Mr. Chavez moved to approve the special use permit for Mountainair Concrete. Mr. Frost seconds the motion. **MOTION CARRIED**

E911 PROJECT 03-E-E911 GRANT NO. 92-3-NR-J-10-G-13

Ms. Shirley Whatley, Emergency Services Coordinator stated that we could probably take care of item numbers 11, 12, 13, 14 and 15 all at once. Items 11, 12 and 13, are new grant agreements for the upgrade we will be getting. I have talked to Motorola about the equipment needed. These agreements are what DFA needs to start the process. Items 14 and 15 are amendments that we already have in place but we have to do another amendment because the funding amount has been increased. **ACTION TAKEN**: Mr. Chavez moved to approve item numbers 11, 12 and 13 E911 Project Grant Agreements and item numbers 14 and 15 amendments to E911 Grants. Mr. Frost seconds the motion. **MOTION CARRIED**

16. MILEAGE & PER DIEM ACT DESIGNATION

Mr. Ayre stated that the increase could go to $85.00 per diem per day and .32 cents a mile. Mr. Riley stated I do not mind the increase on the mileage but the increase of $85.00 is a lot of money. Mr. Ayre stated in Santa Fe and the high dollar cities $85.00 is not enough unless you share a room with some one. Ms. Whatley said that $75.00 would be better than $65.00 it is hard to find motels for that price. Mr. Ayre stated that the per diem is for room and meals. Mr. Riley proposed that we go .32 cents a mile and $75.00 a day. **ACTION TAKEN:** Mr. Frost moved to increase the per diem to $75.00 a day and .32 cents a mile. Mr. Chavez seconds the motion. **MOTION CARRIED**

17. 2003-04 OPERATING BUDGET

Mr. Ayre stated that we are not ready for the final approval yet we have one more meeting. Mr. Riley asked if any one had any questions or comments on the budget? There were none. Mr. Riley stated the budget would be approved at the next commission meeting. Discussion only. **NO ACTION TAKEN**

EXECUTIVE SESSION

ACTION TAKEN: Motion is made by Mr. Chavez to go into executive session pursuant to 10-15-H regarding limited personnel matters, pending litigation, purchase acquisition and disposal of real property. Mr. Frost seconds the motion. Roll call vote. Mr. Riley – yes, Mr. Frost – yes, Mr. Chavez – yes. Executive session began at 10:30 am.

Executive session reconvened at 11:30 am

ADJOURNMENT

ACTION TAKEN: There being no further action to come before the commission, motion is made by Mr. Chavez to adjourn the July 9, 2003 regular commission meeting. Mr. Frost seconds the motion. MOTION CARRIED. The July 9, 2003 meeting adjourned at 11:35 am.

Chester Riley – Chairman

Linda Kayser – Deputy County Clerk

07/23/03
Date

Thursday, May 26, 2005

Enhanced-911 Upgrade Coming

By Beth Hahn
Mountain View Telegraph

In New Mexico, more than 60 percent of 911 emergency calls are dialed from cellular phones. Unfortunately, most emergency call centers cannot retrieve information such as a phone number or location when the call is made from a cell phone.

That will all change by 2007, said the state's wireless 911 program manager, Art Rios.

Rios updated the Torrance County Commission on the statewide effort to enhance 911 call centers during Wednesday's regular commission meeting.

"The (Federal Communications Commission) has mandated that the same information be available on cell 911 as on landlines," he said.

A 911 call from a landline will transmit information including an address and phone number to the emergency center. Rios said some cell phone companies will transmit a general number— which allows the emergency center to contact the company rather than the caller— to the emergency call center when 911 is dialed— if that.

"Some companies just don't send anything, so the operator doesn't know who is calling and can't get a call-back number if the call is dropped or cut off," he said.

Rios said it is more important than ever to upgrade technology in call centers to trace cell phone calls and locations because more people are beginning to use cell phones as primary contacts instead of landlines.

Torrance County is in the process of upgrading to phase 1 of enhanced 911, which will allow operators to get the number from the cell phone and possibly a name, depending on the carrier's preferences.

County 911 manager Shirley Whatley said some wireless service providers already send the number and name of the cell phone owner to emergency centers when a call is made. However, many do not.

Phase 2, which will allow the emergency call center to map a general location of the cell phone, must be completed by 2007, Rios said.

Torrance County tends to be ahead of the curve, he said, and it is likely that the county's dispatch center will be fully upgraded well before the 2007 deadline.

"The paramount thing is public safety within your area and officer safety as well," said Rios.

Whatley said residents are welcome to call 911 from their cell phones and have the operator check to see what information is transmitted to the emergency center. Operators may not be able to check the information right away if they are dealing with an emergency, she added.

Thursday, July 17, 2008

'An Electronic Crumb Trail'

By Rory Mcclannahan
Mountain View Telegraph

Hansel and Gretel left a trail of bread crumbs so they could find their way home.

We all know how that ended. If only the Teutonic twosome had taken a Global Positioning System, they wouldn't have had as much trouble. Of course, the trouble with a GPS is that it's only as good as the information it uses.

And in the case of Torrance County, Hansel and Gretel's bread crumb trail has needed updating.

The county started work on updating its GPS information at the beginning of July with the help of a state 911 grant. Ben Daugherty, a dispatcher with Torrance County, was trained on the software needed to update addresses and roads, and is now busy driving every road in the county to make sure houses are on roads and addressed properly.

"It's a lot like creating an electronic bread crumb trail," Daugherty said. "It will make it easier for emergency response to make it to homes when they are dispatched."

Dorothy Gibson, Torrance County's emergency services director, said the county received a $40,000 grant from the state's E-911 program. The grant allowed the county to hire Special Data Research to compile data collected by Daugherty. The updated addressing will be given to the state, which in turn will give it back to Torrance County.

Gibson said the county's addressing was last updated about 10 years ago. At that time, however, the county had to do most of the work by hand and did not have the latest satellite imaging maps to work with. Some roads and homes fell through the cracks.

The main problem facing the dispatch center is that many homes are not listed in its database, Gibson said. That means dispatchers can lose valuable time asking for directions from a person who calls 911. If someone calls 911 and can't speak, that could be a big problem, Gibson said. So far, that hasn't happened, she said.

"It could be a lot worse for us," Gibson said. "But fortunately our dispatchers are pretty good about where things are located in the county."

During his survey of the county, Daugherty will visit every home. If the home and the road where it is located are clearly marked, he enters that information into his laptop computer.

However, if a house is not marked or there is a question as to its address, Daugherty will knock on the door and talk to the resident. If the resident isn't there, he leaves a postcard the resident can use to update address information.

Daugherty said the most difficult area will be where the Trigo and Big Spring Fires destroyed homes. Those homes are shown on recent maps, but will obviously not be there when Daugherty comes through.

"I just want those folks to put up a clear address sign, so I'll know that they intend to rebuild and not get eliminated off the addressing system," he said.

Gibson said the project will probably take until the end of August to complete.

For more information on the project or any 911 issues, contact Gibson at 384-2705.

Back to story page

Clerk's COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MOLLY GARRISON, individually and as the personal representative of the ESTATE OF RALPH GARRISON, deceased,

Plaintiff,

-vs-

No. CIV 96-1801 LH/DJS

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON, DEPUTY ERIK LITTLE, DEPUTY JAMES MONTEITH, DEPUTY JAMES GONZALES, DEPUTY PATRICK LUCERO, DEPUTY FERMIN ORTEGA, DEPUTY GREG REESE, DEPUTY DAVID ARCHIBEQUE, and DEPUTY VAN ELDREDGE in their individual and official capacities,

Defendants.

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
MAR 12 1999
CLERK

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim (City's Motion No. III) (Docket No. 30), filed July 17, 1997; Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (County's Motion) (Docket No.

137

69), filed October 24, 1997; City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (City's Motion No. VI) (Docket No. 74), filed November 5, 1997; City Defendants' Motion for Partial Summary Judgment No. VII: Qualified Immunity for Defendant Officers Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (City's Motion No. VII) (Docket No. 85), filed January 8, 1998; and County Defendants' Supplemental Motion for Summary Judgment on Plaintiffs' [sic] Civil Rights Claims (County's Supplemental Motion) (Docket No. 108), filed August 5, 1998. The Court, having considered the pleadings submitted by the parties, including cross-referenced statements of undisputed material facts and affidavits submitted with previously ruled upon motions and supplemental pleadings, the oral argument of counsel at hearing, and the applicable law, and otherwise being fully advised, finds that City's Motion No. III is well taken and will be **granted**, County's Motion is well taken in part and will be **granted in part**, City's Motion No. VI is well taken in part and will be **granted in part**, City's Motion No. VII is well taken and will be **granted**, and County's Supplemental Motion is well taken and will be **granted**.

FACTUAL BACKGROUND

This suit stems from a most unfortunate event, the shooting of sixty-nine year old Ralph Garrison by members of the Albuquerque Police Department (APD) and the Bernalillo County Sheriff's Office (BCSO) at his home on December 16, 1996, while they were executing a search warrant on Mr. Garrison's adjacent rental property. Mr. Garrison subsequently died of his wounds. The relevant facts in this case have been extensively developed through affidavits and depositions.

In early December 1996, an APD investigation turned up evidence of a criminal conspiracy involving stolen and counterfeit checks, counterfeit United States currency, and other felony white-collar activity, the proceeds of which were used in part by the conspirators to supply their methamphetamine drug habits. A coconspirator told investigators that equipment used to make counterfeit documents was kept at a residence located at 2615 Quincy N.E. Further investigation revealed that this property was rented by certain other coconspirators from Ralph Garrison, who resided at 2619 Quincy N.E. There was no evidence linking Mr. Garrison to the criminal activities.

A search warrant for 2615 Quincy was issued on December 13, 1996. For a variety of reasons, including the determination that detectives in the White Collar Crimes Unit were neither adequately trained nor suitably equipped to execute the warrant against the potentially armed and violent suspects expected to be present in the two "fortified"[1] structures on the property, APD's Special Weapons and Tactics (SWAT) Unit agreed to plan and carry out the operation. Execution of the warrant was tentatively scheduled for December 16, 1996, at 9:00 a.m. After reviewing relevant information regarding the suspects and surveying the subject location and adjacent neighborhood several times, including from the air in a United States Customs Service helicopter, an APD SWAT officer determined that, due to pedestrian and vehicular traffic, 6:00 a.m. would be the safest time of day to serve the warrant. He also concluded that more SWAT officers than were available to the APD SWAT Unit would be needed to safely and effectively enter the buildings on the property. Thus, the assistance of the BCSO SWAT Team was secured. After further joint planning by officers of both SWAT units, the final plan for execution of the warrant was approved:

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[1] The property was protected by a tall fence with a locking gate, wrought iron bars on the front door and windows of the front structure, a wrought iron door on the rear structure, and a Rottweiler dog in the backyard.

The search warrant was to be served at 6:00 a.m., with the APD SWAT Unit entering the main residence and the BCSO SWAT Team securing the backyard and entering the rear structure.

Members of the APD SWAT Unit, BCSO SWAT Team, APD White Collar Crimes Unit, APD Air Support Unit, and an APD Tactical Emergency Medical Support (TEMS) officer met at 3:00 a.m. on December 16, 1996, to review plans for execution of the search warrant. APD Air Support officers showed a previously videotaped forward looking infrared[2] (FLIR) aerial view of 2615 Quincy and the surrounding area. They also announced that a United States Customs Service helicopter, equipped with a FLIR video camera and a Night Sun spotlight,[3] would hover at approximately 300 feet while the warrant was being executed and illuminate the property and surrounding area after the SWAT officers made their initial entry. Information concerning the criminal case, search warrant, and suspects was also provided. No information was given about Mr. Garrison or any other neighbor, however, as surveillance had revealed no reason to conclude that they posed a threat to the officers' safety. Accordingly, the officers were instructed to treat the threat posed by neighbors as "unknown." Diagrams of the staging area and subject property and RAP sheets and photos of the suspects were passed out. Participants were briefed on the plan and assigned their specific responsibilities, which they then rehearsed. The APD and BCSO SWAT units then conducted individual team briefings covering their assigned duties.

The duty sergeant at the North Area Command was informed shortly after 4:00 a.m. that a search warrant would be executed at 2615 Quincy N.E. at approximately 6:01 a.m. that morning.

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[2] A FLIR camera allows observation of people and objects on the ground in the absence of an ambient light source.

[3] At an altitude of about 300 feet, the Night Sun produces light sufficient for a person on the ground to read a newspaper at night.

Also, the Albuquerque Fire Department (AFD)was notified and asked to have a rescue unit standing by. At 4:20 a.m., APD radio dispatch (Valley III) was told of the operation and asked to send an APD Field Investigator to the warrant site sometime after 6:10 a.m.

Shortly after 5:30 a.m., the participants met at the staging area, a parking lot located closer to the Quincy address, where they were joined by a United States Secret Service Special Agent. The APD SWAT Unit officers wore black Nomex fatigue uniforms, Nomex balaclavas, and Nomex flight gloves. A 3 ½ by 4 ½ inch APD shoulder patch was sewn on the left arm of the fatigues and a 3 ½ by 4 ½ SWAT Unit patch on the right sleeve. Both patches were centered about one inch below the shoulder. Over the tactical uniforms the officers wore bullet-resistant body armor, with a cloth silver or gold APD badge sewn on the left breast area. Additionally, all wore equipment vests, bullet-resistant helmets, and safety goggles or glasses. They also carried specialized firearms, including hand guns, shot guns, and semi-automatic rifles. The BCSO SWAT Team deputies were similarly attired and equipped.

While waiting in the parking lot, the U.S. Customs pilot informed the participants that the lights were on in the main residence at 2615 Quincy. Several officers who conducted a drive-by confirmed this information and stated that there was activity inside the residence. At approximately 6:00 a.m. the authorities proceeded to the warrant location in several APD vehicles, including a raid truck, "pull" vehicle, SWAT Unit equipment truck, and two K-9 vehicles, the BCSO SWAT Team raid truck and CNT truck, and an unmarked car.

On arrival at approximately 6:03 a.m., a deputy sheriff used the BCSO CNT truck to breach the gate on the south side of 2615 Quincy.[4] Another officer positioned the "pull" vehicle at the southeast corner of the property, in case it was needed to remove the wrought iron door on the front building. The raid truck was parked in front of the residence and APD SWAT team officers exited and took their positions. Officer Bledsoe drove his APD K-9 truck[5] north through the alley on the west side of the property, stopping next to a three foot high cinder block wall topped by a three foot chain link fence directly behind 2619 Quincy.

The APD SWAT Team entered the main residence through the unlocked front door, without using any forced-entry tools or flash diversionary devices. The building and its occupant were secured in short order and the White Collar Crimes detectives then conducted the search.

As the APD SWAT Unit approached the front building, the BCSO SWAT Team secured the backyard area around the rear structure and provided cover to the entry team. Deputies Little[6] and Monteith positioned themselves in front of the combination cinder block wall and chain link fence[7] that separated 2615 Quincy from 2619 Quincy. As the Customs helicopter began to lower its hover to 300 feet, the County SWAT Team announced itself at the wrought iron door of the rear structure. There being no response, two deputies unsuccessfully attempted entry with a hand-held ram, halligan

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[4] The gate's lock was protected by a metal enclosure which prevented breaching tools from quickly and effectively removing the lock.

[5] The K-9 truck was marked as a police vehicle, with overhead emergency lights, APD badges on the driver and passenger's doors, and "CAUTION POLICE DOG" written in four-inch letters on the side.

[6] Deputy Little, who had spent several years as a canine officer, carried a black CO_2 fire extinguisher to pacify the reported guard dog, but no dog was found on the property.

[7] Chain link fencing, approximately three feet in height, topped a cinder block wall, which varied in height from about three feet to one foot as it ran from east to west.

tool, and pry bar[8] while others loudly shouted, "Sheriff's Department! Search warrant!" Next a deputy shot two Remington 870 12-gauge, "shok lock," rounds into the lock mechanism, but the door still remained secure. Finally, the deputy shot two one-ounce, 12-gauge slug rounds into the lock and the door was opened with the pry bar. After a flash diversionary device was deployed through the door, the BCSO SWAT Team entered the structure. The helicopter hovered at 300 feet, illuminating the area with its Night Sun.[9] The time was approximately 6:05 a.m.

While the BCSO SWAT Team was attempting to enter the rear building, a man, later identified as Mr. Garrison, walked out of the rear of the house at 2619 Quincy, into the backyard. Deputy Little shouted standard departmental warnings at him: "Sheriff's Department." "We're executing a search warrant!" "Go back inside your house!" Mr. Garrison walked toward Deputy Monteith, saying, "What's going on? That's my property." Mr. Garrison did not appear to understand and the police continued giving their warnings. As Mr. Garrison looked directly at him, Deputy Monteith shouted, "Go back in your house! Sheriff's Department! Go back in your house!" Mr. Garrison, however, continued walking toward Deputy Monteith. Deputy Little repeatedly yelled, "Sheriff's Department! We're executing a search warrant! Go back inside your house!" He also shouted, "Police Department! We're executing a search warrant!" At the same time, Officer Bledsoe,[10] standing next to the K-9 truck in the alley behind the Garrison house, yelled twice, "Police Department! Go back inside!" Detective (Det.) Maez, also in the alley, shouted "Police Department! Go back inside!" and turned around so Mr. Garrison could see the word "POLICE"

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[8] More than fifteen attempts were made to open the door in this manner.

[9] The helicopter also recorded the warrant service on its FLIR videotape system.

[10] APD K-9 Officer Bledsoe wore a tactical uniform similar to that of the APD SWAT Unit.

written in six-inch block letters on the back of his raid jacket.[11] When Mr. Garrison got to within seven to ten yards, Deputy Little again yelled at him to go back inside his house. Mr. Garrison finally stood only about seven feet away from and looked directly at Deputy Monteith, who ordered him to go back inside his house. Mr. Garrison responded, "That's my property," and slowly walked back inside his house. Deputy Monteith then heard Deputy Little say something like, "I hope he doesn't come out with a gun." Deputy Monteith thought this was a possibility and that he should be careful.

This initial encounter with Mr. Garrison lasted approximately one minute. The area was illuminated by the helicopter's Night Sun spotlight[12] and none of the officers shined any flashlights or spotlights at Mr. Garrison.[13] When the helicopter was released,[14] Officer Bledsoe illuminated the area by the rear door of 2619 Quincy with the spotlight on his K-9 Unit vehicle.

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[11] Det. Maez's jacket also had a patch on the left shoulder and a badge on the front.

[12] Lighting conditions were undoubtedly poor, particularly from Mr. Garrison's viewpoint. Based on a subsequent APD reinactment, "only vague silhouettes could be seen in the backyard of 2615 Quincy" from Mr. Garrison's bedroom window and "[t]he same conditions were present at the back doorway. The spotlight from the helicopter made body shapes easier to see but only for brief moments." (Pl's. Resp. County's Motion (Docket No. 71), Ex. E at 9; *see id.* Ex. F at 7 ("It was pretty poorly lit. . . .It was all pretty dark. Everything was done by flashlight. . . . [T]here was some illumination from the US Customs A Star, their helicopter. But it wasn't much . . . .").)

[13] Plaintiff questions this fact by quoting a transcription of the "911" call compiled by Det. Rick Foley on December 19, 1996: "[T]hey *had* flashlights in my face and everything." (*Id.* Ex. G at 2 (emphasis added).) According to the transcription produced by Paul Ginsberg, President of Professional Audio Laboratories, Inc., however, Mr. Garrison said, "They've *got* flashlights on my face and everything . . . ." (Mem. Support City's Motion No. III (Docket No. 31) Ex. A. Attach. 2 at 2 (emphasis added).) Mr. Ginsberg described his qualifications and methodology in detail in his affidavit, which he closed by stating, "To a reasonable degree of certainty, it is my expert opinion that the transcript of Mr. Garrison's 911 call fairly and accurately represents the words spoken and recorded on the Dictaphone logger tape." (*Id.* Ex. A ¶ 24.) Plaintiff provides no other support for her supposition that flashlights were shined in Mr. Garrison's face when he went into his backyard to investigate, and the Court has found none. Rather, the evidence by affidavit and deposition is that none of the officers did so.

[14] The helicopter was released when execution of the search warrant was completed by entering and securing both buildings at 2615 Quincy.

At approximately 6:05:30 a.m., Mr. Garrison called "911"[15] and told Emergency Operator 90, Gilbert Duran, "It's at 2619 Quincy, NE. They're breaking into my house. A whole bunch of people." The Operator asked Mr. Garrison who was breaking in, how many people there were, and how they were trying to get in. Mr. Garrison responded that he didn't know who they were, but there was "a whole bunch of people out there" and they wouldn't let him go out. He estimated there were three to five people and said that he didn't know exactly "because they've got flashlights and everything out there." He stated that they were using axes, hammers, and "all kinds of things," to break in and declared, "I got a gun. I'm gonna go up there and shoot 'em."

The Operator requested that Mr. Garrison remain on the phone and told him that he was "getting somebody out there." The Operator continued questioning Mr. Garrison, asking for a description. Mr. Garrison answered, "They've got flashlights on my face and everything . . . . I'm gonna get my gun." The Operator persisted, asking, "Do you know who they are?" Mr. Garrison replied, "2619. I don't even know nobody or nothin'. Please. Please. I'm gonna go out there, please, thank you. My name is Ralph Garrison." The Operator then said, "Okay, just stay on the phone with me, okay?," to which Mr. Garrison responded, "Okay, I can't, I gotta go see what's happening out there." About twenty seconds later, the Operator told Mr. Garrison, "Okay, just stay on the phone sir. I'm getting somebody out there. Can you see what they're doing?" Mr. Garrison answered, "They're breaking in with axes and [unintelligible]. Please hurry up. Please hurry up. They got flashlights and cars and trucks and all kinds of stuff back there. Please, please hurry up. I'm gonna go out there now. Thank you." The Operator then inquired whether Mr. Garrison could take the phone with him and when Mr. Garrison answered, "Yes," asked him to do so. Mr. Garrison

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[15] The quoted language is from the transcription produced by Paul Ginsberg. (*Id.* Ex. A, Attach. 2.)

then stated, "They got the lights and everything in my face. . . . Oh yes, I can't see, I can't see, I can barely see nothing what's going on. . . . . I got my gun. I'll shoot the sons of bitches."

At 6:08:22 a.m., an unknown officer is heard saying, "Drop the gun." Another officer follows immediately with, "Put that down." Shots were fired at 6:08:24 and white noise ensued. When deputies reached Mr. Garrison immediately following the shooting, he was lying on the floor inside the glass rear storm door. A fully loaded and cocked .22 caliber nine-shot High Standard brand revolver lay near his feet.

APD SWAT Unit Officer Neal Terry participated in the entry of the main residence at 2615 Quincy. Once that structure was secured, he proceeded to clear the side yard, looking for the Rottweiler, and then, at approximately 6:06 a.m., moved to the backyard to determine if the BCSO SWAT Team required assistance. They had already entered the rear structure, so Officer Terry joined Deputies Little and Monteith at the fence.[16] They were directing their attention toward the rear door of 2619 Quincy, which was illuminated by the K-9 Unit vehicle's spotlight, and was about thirty-five feet away. After discussing the BCSO SWAT Team's entry into the rear structure, Deputy Little described the initial encounter with Mr. Garrison and told Officer Terry that the deputies were providing cover for the BCSO SWAT Team and the White Collar Crimes Unit from any potential threat posed by Mr. Garrison or any other hostile persons who were inside 2619 Quincy. Deputy Little also said something to the effect, "Watch this guy come out with a gun now."

As the conversation continued, Deputy Monteith yelled, "Drop the gun," and then, "Put it down." Mr. Garrison was standing behind the glass storm door of his residence. He moved into the

[16] Other officers in the area at this time included Det. Lucero, leaving the rear structure for the main residence, Deputy Eldredge, picking up casings outside the door of the rear structure, Acting Lieutenant (A/Lt.) Bozell, standing a few feet away from Deputy Eldredge and about three feet from Deputy Monteith, and Sergeant Simonson and Deputy Lucero, standing by the BCSO CNT truck by the breached entry gate on the south side of 2615 Quincy.

doorway, holding what appeared to be a single action, Colt pattern semi-automatic pistol in his right hand and another object in his left hand.[17] Because Deputy Little was standing between him and the doorway at 2619 Quincy, Officer Terry moved to the right, raised his AR-15 rifle, and trained it on Mr. Garrison.

As Mr. Garrison began opening the storm door with his left hand, he raised the pistol to eye level and pointed it in the direction of Deputy Monteith and the other officers located in that direction. When Det. Lucero, who was standing behind Deputy Monteith, saw that the muzzle of the gun was pointed directly at him, he moved for the cover of the rear building and began to draw his weapon. A/Lt. Bozell and Deputy Eldredge also took cover. Officer Terry, in response to a perceived immediate threat of deadly assault against his fellow officers, fired one round at Mr. Garrison. Seeing Mr. Garrison still standing with the gun raised in his hand, Officer Terry fired a second shot. Deputies Little and Monteith, perceiving similar threats to themselves and the other officers, also fired shots at Mr. Garrison.

After Mr. Garrison fell from view, Officer Lopez and several deputies[18] entered the backyard of 2619 Quincy and approached the rear door of the residence. Deputies Little and Eldredge reached the back door first and found Mr. Garrison conscious and lying on the floor with the revolver near

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[17] This was later identified as a telephone.

[18] Officer Terry remained at his position at 2615 Quincy and never entered the Garrison property. All of the Sheriff's Department personnel present, except Deputy Fermin Ortega, entered the Garrison residence at some point following the shooting.

his feet. As Deputy Little opened the storm door, an aggressive dog stepped over Mr. Garrison toward the officers. Deputy Little shot the Chow.[19]

Deputies Reese and Archibeque remained with Mr. Garrison, who was lying on his back, moving,[20] apparently making some attempt to sit up. When advised by Deputy Reese that Mr. Garrison was moving, Deputy Gonzales told Deputy Reese to handcuff him for safety reasons.[21] Deputy Archibeque proceeded to handcuff Mr. Garrison, while Deputy Reese covered him with his rifle. Mr. Garrison had been shot in the torso and right wrist. Part of his wrist was missing; there was a "U" shaped wound about halfway into the wrist. Deputy Archibeque applied a cuff to Mr. Garrison's uninjured wrist first, rolled him on his side and then to his stomach, and placed the other cuff on "as gently" as he could to the injured wrist. Mr. Garrison was handcuffed for a few minutes. Once the sweep was completed, Officer Lopez requested medical assistance for Mr. Garrison. APD TEMS Officer Madrid responded and administered basic life support to Mr. Garrison until the house was secured and on-the-scene AFD paramedics could begin their treatment. Officer Madrid assisted in transporting Mr. Garrison to a hospital.

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[19] Officer Little recognized that the Chow was about to attack and believed it to be a threat to the officers' safety. They could not safely enter and clear the house while the dog was unrestrained and it also prevented medical personnel from entering to assist Mr. Garrison. Deputies could not use chemical mace against the Chow in the confined area of the work room where Mr. Garrison lay without contaminating themselves and medical personnel.

[20] A/Lt. Bozell and Deputy Gonzales stated at their depositions that they did not see Mr. Garrison move as they passed by him into the house. Neither of them, however, stayed with Mr. Garrison, as did Deputies Reese and Archibeque. Both Deputy Reese and Deputy Archibeque testified that Mr. Garrison was moving while they guarded him. It was on being informed of this fact that Deputy Gonzales ordered them to handcuff Mr. Garrison. The Court therefore does not find any genuine issue of material fact as to the issue of whether Mr. Garrison was moving.

[21] At this time, Deputy Gonzales, who was involved in the protective sweep of the house, was not aware of the severity of Mr. Garrison's injuries.

In the meantime, Officer Lopez and other deputies conducted a protective sweep of the house, looking for other suspects.[22] Mrs. Molly Garrison was the only other person the officers found.[23] Deputy Eldredge encountered Mrs. Garrison, in her night clothes, walking with her walker toward the bathroom adjacent to her bedroom. He twice asked Mrs. Garrison to stop and not go to the bathroom because he needed to search it.[24] Mrs. Garrison did not wait, but went into the bathroom. Deputy Eldredge then told her not to close the door and did not allow her to do so. He maintained continuous eye contact with her while she remained in the bathroom. Officer Little passed through the bedroom at that time and observed that Mrs. Garrison was sitting on the toilet and that the door was open. After Mrs. Garrison left the bathroom, Deputy Lucero went in and checked to ensure there wasn't anybody else present. He also looked for any weapons, including inside the medicine cabinet. Mrs. Garrison then went back into the bathroom and was allowed to close the door.

As she walked back to her bed from the bathroom Mrs. Garrison saw that deputies were moving her furniture in the living room. Although deputies asked her to wait on the couch in the

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[22] None of the suspected dangerous individuals were found during the execution of the search warrant at 2615 Quincy. The only person present when the warrant was executed was the woman who had originally informed police that counterfeiting equipment was kept at that location. She was arrested and told officers that two of the suspects had left minutes before the arrival of the APD and BCSO SWAT teams. Thus, the officers believed that those suspects or other unknown assailants could be at 2619 Quincy.

[23] Mrs. Garrison later recounted that on the morning of December 16, she was awakened by banging and woke her husband by calling to him in the next room. Because of all the lights, she told him, "Look at the house is [sic] on fire." Mr. Garrison got up and went toward the kitchen to get the portable phone. He was gone for "[m]aybe a few minutes, and that's all," and Mrs. Garrison could not see him while he was gone. When he returned he went into his bedroom and she heard him talking on the phone. He then was going out again and when Mrs. Garrison followed him, he told her to go back to her room, which she did. She returned to her bed, from which she could not observe the kitchen or the back door, and she never saw her husband again.

[24] Local law enforcement officers have been trained not to let people go into bathrooms or other rooms and close the door before the room has been secured by authorities. This policy apparently stems from the shooting of an APD officer several years before this incident. The officer allowed a male subject to go into the bathroom. The subject subsequently came out of the bathroom with a gun and shot the officer.

living room, she chose and was allowed to remain in her bed. Deputies also searched her room and closet, removing everything from her drawers. Although she asked the deputies who they were, what they were looking for, and what was going on, they did not tell her anything. Once the area was secured, however, Deputies Eldredge and Lucero removed their balaclavas, to improve their communication with her and in an attempt to put her more at ease.

Mrs. Garrison appeared to the officers to be in frail condition and in need of assistance in caring for herself.[25] As all personnel were needed to secure the crime scene and investigate the shooting, Officer Lopez and A/Sgt. Rodriguez agreed that a relative should be contacted. Mrs. Garrison's son, Benny Garrison, was called. Deputies Lucero and Eldredge stayed with Mrs. Garrison until he arrived at about 7:00 a.m. A/Sgt. Rodriguez briefly explained to him what had occurred that morning and officers helped take Mrs. Garrison to her son's vehicle.

PROCEDURAL BACKGROUND

Mrs. Garrison filed suit on her behalf and as the personal representative of her husband's estate on December 23, 1996. On July 28, 1997, she amended the complaint. She filed her Second Amended Complaint for Civil Rights Violations and State Tort Claims on October 3, 1997, asserting claims for unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments, supervisory and official capacity liability for violation of constitutional rights, conspiracy to violate civil rights under 42 U.S.C. § 1983, wrongful death caused by law enforcement officers' assault and battery, false imprisonment by law enforcement officers, and negligence of law enforcement officers

[25] Mr. Garrison provided around-the-clock care for his wife, who was "infirm and could only walk a few steps at a time with a walker." (Second Am. Comp. at ¶ 20.) In her deposition testimony on March 12, 1997, Mrs. Garrison said she was dependent upon her husband twenty-four hours a day as her nurse and housekeeper and to help her walk. She stated that with the aid of her walker she could go to the living room, kitchen, and bathroom, but that she never went as far as the back of the house. Deposition testimony by Mrs. Garrison taken on June 13, 1997, has also been submitted in part to the Court.

causing enumerated torts. Over the course of this case, Defendants have filed eleven motions for dismissal or partial summary judgment. On November 14, 1997, the Court heard oral argument on all then pending motions. At that time, City's Motions Nos. III and VI and County's Motion were taken under advisement, in whole or in part, pending further discovery and supplemental briefing. (*See* Order, filed March 31, 1998.) Plaintiff filed her Amended Supplemental Response on March 25, 1998, and Defendants City and County responded on March 31, 1998, and April 2, 1998, respectively. Additionally, the City filed its Motion No. VII on January 8, 1998, and the County its Supplemental Motion on August 5, 1998, both of which address issues related to those in the Motions previously taken under advisement.

ANALYSIS

Section 1983 Claims

1. Unreasonable Seizure of Mr. Garrison

Plaintiff asserts that Defendants seized Mr. Garrison without probable cause and used excessive force by shooting him and subsequently handcuffing him, in violation of the Fourth and Fourteenth Amendments. Both the City and the County move for summary judgment on the Plaintiff's unreasonable seizure claim on grounds of qualified immunity. (City's Motion Nos. III and VII and County's Motion and Supplemental Motion.) Their arguments will be considered together.

The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "A necessary concomitant to the determination of

whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Thus, once a defendant pleads qualified immunity, the burden shifts to the plaintiff "to show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988).

The defense of qualified immunity is, as a practical matter, of limited value in excessive force cases. This is because police use of excessive force is a clearly established violation of constitutional rights. The focus of the substantive inquiry that decides the Fourth Amendment issue, whether the force used was objectively reasonable, is the same inquiry that determines whether qualified immunity is available to a government actor. *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991). Thus, "the qualified immunity and excessive force analysis do not differ in any significant respect." *Diaz v. Salazar*, 924 F. Supp. 1088, 1093 (D.N.M. 1996).

The Fourth Amendment's protections regarding a "seizure" are triggered "only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)(quoting *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968) and citing *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)); *see also County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1715 (1998)("[A] Fourth Amendment seizure [occurs] only when there is a governmental termination of freedom of movement through means intentionally applied.")(quoting *Brower*, 489 U.S. at 596-97). A § 1983 claim of use of excessive force during a seizure is analyzed by determining "whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances," *Allen v.*

Muskogee, 119 F.3d 837, 840 (10th Cir. 1997)(citing *Graham*, 490 U.S. at 397; *Thompson v. City of Lawrence*, 58 F.3d 1511, 1516 (10th Cir. 1995)):

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

Diaz, 924 F. Supp. at 1093 (ellipses in original)(quoting *Graham*, 490 U.S. at 396-97). The inquiry, then, requires the Court to examine "whether the totality of the circumstances justified a particular sort of . . . seizure," giving consideration to factors such as the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether the subject is resisting arrest or attempting to avoid arrest. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

The excessive force inquiry includes "not only the officers' actions at the moment that the threat was presented, but also *may* include their actions in the *moments* leading up to the suspect's threat of force." *Allen*, 119 F.3d at 840 (emphasis added). Reasonableness "depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct *during the seizure* unreasonably created the need to use such force." *Id.* (emphasis added)(quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)). Thus, an officer's conduct prior to the suspect's threat of force will be considered by the Court if that conduct is "'*immediately connected*' to the suspect's threat of force." *Id.* (emphasis added)(quoting *Romero v. Board of County Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995)); *see also Diaz*, 924 F. Supp. at 1096 ("To the extent pre-seizure conduct is immediately connected, both contemporaneously and causally, to the eventual seizure at issue, that conduct should be examined in determining the objective reasonableness of the force employed to effect the seizure.").

A. Shooting

Defendants maintain that the actual seizure of Mr. Garrison, his being shot by Officer Terry and Deputies Little and Monteith while pointing a gun in their direction, was reasonable and, thus, not a constitutional violation of Mr. Garrison's Fourth Amendment rights. They also contend that in December 1996 the law was not clearly established whether acts immediately connected to the seizure/shooting, those allegedly creating a dangerous situation necessitating the shooting of Mr. Garrison by the police, were relevant in assessing the reasonableness of the officers' actions. *Compare Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995)(citing *Quezada*, 944 F.2d, at 717), *and Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir. 1994), *with Sevier*, 60 F.3d 695, *and Diaz*, 924 F. Supp. 1088. Finally, they argue that even if the preceding acts during the first encounter with Mr. Garrison are considered, Defendants' behavior was lawful.

Plaintiff asserts that Defendants are liable because they generated the necessity to kill Mr. Garrison by recklessly causing him to engage in an assault, that their reckless conduct prior to, but immediately connected with the shooting, created the need to use deadly force against Mr. Garrison. Plaintiff contends that there are genuine issues of material fact as to whether the noise generated by the entry into the rear structure at 2615 Quincy would have caused a reasonable person in Mr. Garrison's position to fear for the safety of his tenants and rental property, causing him to arm himself; whether Defendants knew or recklessly disregarded that Mr. Garrison did not know that they were police officers and that he might, therefore, return with a gun; whether the first encounter was immediately connected to the second; and whether, in light of their knowledge, the officers acted unreasonably in failing to take cover, failing to tell other officers in the yard to take cover, and failing to make another attempt to tell Mr. Garrison who they were.

There is no dispute that Mr. Garrison had a gun in his hand as he began opening his rear storm door at approximately 6:08 a.m. on December 16, 1996, and that he aimed his gun in the direction of Deputy Monteith and the other officers in that area. It therefore was reasonable for Officer Terry and Deputies Little and Monteith to believe that their lives and those of their fellow officers were in danger at that moment and to respond by shooting Mr. Garrison. *See Wilson*, 52 F.3d at 1554 ("Any police officer in Officer Meeks' position would reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a .357 magnum revolver pointed in his general direction.").

The Fourth Amendment does not require use of the least intrusive means, only reasonable ones. *Wilson*, 52 F.3d at 1553-54; *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994). The standard, then, is whether from an objective viewpoint and taking all factors into consideration, the police react reasonably to a threat. *Wilson*, 52 F.3d at 1553-54; *Melendez-Garcia*, 28 F.3d at 1052. Officer Terry and Deputies Little and Monteith did so. They reasonably feared for their and their colleagues' lives and they reacted reasonably to that threat. The Fourth Amendment does not require more. *See Diaz*, 924 F. Supp. at 1100 ("[P]olice are not . . . constitutionally required to respond to a suspect's threat of deadly force with non-deadly force or the least intrusive amount of force."); *see also United States v. Myers*, 106 F.3d 936, 940 (10th Cir. 1997)(early morning "military-style assault" in execution of search warrant at suspected marijuana growing operation in home with sleeping children, including battering down door and deployment of "flash-bang" device by agents dressed in black uniforms and wielding automatic machine guns, objectively reasonable).

Finally, even though Defendants may have had a statutory obligation to again warn that they were police before discharging their weapons, violations of state law and police procedure generally do not give rise to a § 1983 claim. *Romero*, 60 F.3d at 705. Furthermore, mere negligent actions precipitating a confrontation are not actionable under § 1983. *Diaz*, 924 F. Supp. at 1097 (quoting *Sevier*, 60 F. 3d at 699 n.7).

There is no evidence in this case that any Defendant made a deliberate or reckless decision to escalate the encounter with Mr. Garrison into a deadly confrontation.[26] *See id.* Therefore, considering the facts and circumstances not only of the seizure itself, when Mr. Garrison appeared at his rear door, pointed his gun at the officers, and was shot by them, but also of Defendants' acts and omissions previous to the seizure, including their method of entry of the rear structure and what transpired while Mr. Garrison was in his backyard and when he returned to his house, the Court finds that Defendants' actions were objectively reasonable and that they are entitled to qualified immunity as to the unreasonable seizure claim with regard to the shooting.

B. Handcuffing

Plaintiff also brings an excessive force claim with regard to the handcuffing of Mr. Garrison as he lay on his back several feet away from his weapon, not speaking, bleeding from his torso and missing a large part of his right wrist, and under constant surveillance by enforcement officers. She asserts that handcuffing him was futile and cruel because the gun lay on his right side and his right wrist was clearly and severely incapacitated. Defendants Gonzales, Archibeque, and Reese, however, contend that they are entitled to qualified immunity because the handcuffing was

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[26] Even Plaintiff's expert testified at deposition that, "I think that the initial encounter with Mr. Garrison was in fact reasonable and appropriate." (Pl's. Am. Supplemental Resp. Defs.' Mots. Summ. J. (Docket No. 97), Ex. F at 36.)

reasonable under the circumstances. (County Defs.' Reply County's Supp. Motion (Docket No. 110) at 2-5.)

The Tenth Circuit Court of Appeals addressed the issue of handcuffing an injured assailant in *Wilson*. 52 F.3d 1547. There, Officer Meeks twice shot Mr. Wilson, who fell to the ground face down with his gun underneath him. Officer Stock arrived moments later and disarmed Mr. Wilson by placing his foot on the back of Mr. Wilson's knee to prevent him from trying to shoot, holding him by the shoulder, and locating the gun underneath his body. A police lieutenant arrived soon afterward, prior to the arrival of medical help, and ordered Officer Stock to handcuff Mr. Wilson. No medical care or first aid was given until the arrival of fire department emergency medical technicians. When the technician requested that the handcuffs be removed so Mr. Wilson could be turned on his side to facilitate his breathing, the lieutenant, the only officer then present, refused to do so and told the technician to remove them. It took a minute or two find the key to the handcuffs and remove them. The technician then performed CPR, spelled by the lieutenant, but Mr. Wilson died shortly after arriving at the hospital, according to plaintiffs' experts not of the gunshot wounds, but of asphyxiation. Plaintiffs brought a claim for failure to render medical aid and defendants moved for summary judgment based on qualified immunity.

Applying the Eighth Amendment standard of deliberate indifference to the due process rights of pretrial detainees, the court addressed the handcuffing to the extent it prevented Mr. Wilson from helping himself to breathe. Finding that the officers could not be expected to know their actions would exacerbate a medical problem, the court also noted

> the detainee was armed and could have posed a threat to human life. As defendants correctly note, the first duty of a police officer is to ensure the safety of the officers and the public. Handcuffing is a necessary expedient to this end. Handcuffing an armed assailant, even after he has been shot, is not a constitutional violation.

Id. at 1556. Thus, the court found no constitutional violation under the Eighth Amendment, specifically commenting, however, that the handcuffing could raise a question of excessive force as it is a forceful seizure, but that question was not at issue. *Id.* at 1547 n.2.

Plaintiff directs the Court to *Howard v. Dickerson*, 34 F.3d 978 (10th Cir. 1994), a case discussed by the *Wilson* court, and *Palmer v. Sanderson*, 9 F.3d 1433 (9th Cir. 1993), in support of her Fourth Amendment excessive force claim. The Court finds Plaintiff's cases inapposite, given the very different circumstances involved here. At the time Mr. Garrison was handcuffed, the situation was very much in flux: Mr. Garrison had only moments before aimed his gun at officers and been shot, and the officers were in the process of conducting a protective sweep of his residence, not knowing who else was present or whether other weapons were available, but believing other dangerous and armed suspects might well be there. Concern for the safety of the officers and others was immediate and real. Additionally, there is no evidence that there was any intent on the part of the deputies to cause harm to Mr. Garrison in handcuffing him or that the handcuffing adversely affected Mr. Garrison's condition. Deputy Archibeque stated that he put the handcuff on Mr. Garrison's injured wrist "as gently as [he] could," and they were removed after "a few minutes." In light of the surrounding facts and circumstances, the actions of the deputies with regard to handcuffing Mr. Garrison were objectively reasonable and cannot be found to amount to a use of excessive force. *Cf. Fundiller v. City of Cooper City*, 777 F.2d 1436, 1438, 1441 (11th Cir. 1985)(finding "question is close" in reversing dismissal of substantive due process claim of use of excessive force where undercover agent suddenly, without provocation or warning, shot plaintiff five times; other officers did not render aid but dragged him out of car, shackled his hands behind him,

exacerbating one wound, stated they hoped he would bleed to death and shouted obscenities at him while he lay face down on ground).

2. Unreasonable Search

Defendants move for summary judgment on Plaintiff's claim that the search of 2619 Quincy violated her Fourth Amendment rights. (City's Motion No. VII; County's Supplemental Motion.) Plaintiff maintains that Defendants exceeded the permissible scope of a protective sweep of the residence by moving furniture in the living room and searching the drawers in her bedroom and the bathroom cabinet.

A protective sweep is "a quick and limited search of premises, . . . narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 326 (1990). It is conducted incident to an arrest to protect the safety of police officers and others. *Id.* In *Buie*, the Supreme Court held that:

> as an incident to the arrest the officers [can], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the scene.

Id. at 334.

Although Plaintiff contends that moving furniture in the living room exceeds the scope of a protective sweep, the Court does not agree. Mr. Garrison had just threatened the officers by pointing a loaded gun at them. The officers had no idea who was present at 2619 Quincy; the dangerous suspects who they believed were at 2615 Quincy were not found during the execution of the search warrant there and it was not unreasonable, considering Mr. Garrison's actions, for the

officers to believe they might be at 2619 Quincy. Therefore, it was prudent of them to investigate the possible presence of other armed and dangerous persons in the vicinity. *See United States v. Tisdale*, 921 F.2d 1095, 1097 (10th Cir. 1990). Moving furniture to ascertain whether persons are hiding behind it is certainly within the ambit of such a search and Plaintiff has offered no evidence as to what furniture was moved or that Defendants moved furniture for any other purpose.

The search of Mrs. Garrison's bedroom drawers and bathroom cupboard, of course, cannot be justified on grounds of a protective sweep for dangerous persons. This search, however, is valid considering the exigencies of the situation present under the circumstances of this case. *See Warden v. Hayden*, 387 U.S. 294, 298-99 (1967)(necessity for speedy investigation to protect police officers' lives or lives of others justified warrantless entry and search for persons and weapons to insure suspect was only one present and that police had control of all weapons which could be used against them or to effect escape).

Although Plaintiff argues that Deputy Lucero had no reasonable suspicion that Plaintiff posed any danger at all to Defendants, the Court cannot agree. Mrs. Garrison remained in her bedroom and made use of the adjacent bathroom. Mr. Garrison had just aimed a gun at Defendants and a gun in Mrs. Garrison's hand would have posed no less danger to them. Therefore, the limited search for weapons in the drawers and cupboard in these areas to which Mrs. Garrison was given access did not violate her rights. *See United States v. Hernandez*, 941 F.2d 133, 135-38 (2d Cir. 1991)(quick search for weapons in area around bed where officer intended to place non-suspect, handcuffed female, including drawers next to bed and between mattress box and spring, justified to neutralize threat of physical harm)(citing and discussing *Terry*, 392 U.S. 1; *Michigan v. Long*, 463 U.S. 1032 (1983); and *Buie*, 494 U.S. 325).

3. Unreasonable Seizure of Mrs. Garrison

Defendants move for summary judgment on Plaintiff's unreasonable seizure claims. Mrs. Garrison asserts that Defendants seized and detained her without reasonable suspicion, in violation of her Fourth Amendment rights. Specifically, she claims Defendants exceeded any community caretaking function and acted unreasonably in following her around, watching her use the toilet, and refusing to tell her what had happened to her husband and allowing her to go to him.

Law enforcement officers have occasion to seize a person for a variety of reasons, some of which have nothing to do with a desire to prosecute for crime. *United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993)(quoting *Terry*, 392 U.S. at 13). "Indeed, police officers are not only permitted, but expected, to exercise . . . 'community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id.* (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). Such purposes include seizures to "ensure the safety of the public and/or the individual." *Id.* Whether such a seizure is reasonable under the Fourth Amendment first "depends upon whether it is based on specific articulable facts and requires a reviewing court to balance the governmental interest in the police officer's exercise of his or her 'community caretaking function' and the individual's interest in being free from arbitrary government interference." *Id.*

The second prong of the reasonableness inquiry requires a court to determine "whether the officer's action is 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 1562 (quoting *Terry*, 392 U.S. at 20). The focus is on "whether the facts available to the officer would 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* (quoting *Terry*, 392 U.S. at 21-22.) Such evaluation is to be guided by

"common sense and ordinary human experience," *id.* (quoting *United States v. Sharpe*, 470 U.S. 675, 685 (1985)), and while the officer is not required to use the least intrusive means during the course of the detention, the Court must determine whether "failure to use less intrusive means was unreasonable," *id.* at 1562-62 (citing *Sharpe*, 470 U.S. at 686-87).

Officers encountered Mrs. Garrison while conducting their protective sweep of 2619 Quincy after the shooting of Mr. Garrison. As discussed above, it was reasonable for them, in the interests of safety, to search the premises for anyone posing a danger. Initial detention of anyone found, including Mrs. Garrison, likewise was reasonable. Mrs. Garrison, however, was detained for about one hour while authorities contacted and awaited the arrival of her son. Given her physical condition, the nature of the events that had just transpired, and the needs of the police in securing and investigating the crime scene, Defendants had more than sufficient factual basis to exercise their community caretaking functions over Mrs. Garrison. Additionally, balancing the governmental interests at stake and Mrs. Garrison's right to be free from interference finds the former vastly outweighing the latter. Indeed, it is clear that Mrs. Garrison in all likelihood was unable to care for herself. Thus, Defendants detention of Mrs. Garrison must be found to have been justified at its inception and justified in its length.

Mrs. Garrison, however, complains of the degree of interference she experienced: Deputies Eldredge and Lucero were always present, watched her use the toilet in her bathroom, and would not answer her questions as to what was happening. Considering the circumstances of this case, that the deputies stayed with Mrs. Garrison until her son arrived certainly falls within the realm of common sense. Additionally, under the circumstances, the Court cannot find that the deputies' failure to tell Mrs. Garrison what had happened or to allow her to go to her husband was inappropriate.

Furthermore, while their act of watching her use the toilet was certainly highly intrusive, it too was reasonably related in scope to facts initially justifying Mrs. Garrison's detention, the safety of the officers. Until officers could search the areas immediately available to Mrs. Garrison for weapons, it was reasonable of them to keep her under constant surveillance. Just as the search of the bathroom cupboard and bedroom drawers was justified, so, too, was the act of keeping Mrs. Garrison under watch until the search could be completed. As Defendants maintain, anyone, even the elderly and infirm, should be considered a threat if he or she has access to a gun. Therefore, as Mrs. Garrison has not stated a violation of a constitutional right, Defendants are entitled to qualified immunity.

4. Section 1983 Claims Against APD Radio Dispatchers and 911 Operators

Defendant APD Radio Dispatchers Baca, Patrick, and Marquez and 911 Operator Duran move for summary judgment on the § 1983 claim. (City's Motion No. VI.) Mr. Duran took Mr. Garrison's call to "911." The computers were down when the call came in, so Mr. Duran was unable to enter the information he gathered and send it to a dispatcher. Instead, Mr. Duran stood up and said that somebody had a gun, there were several subjects outside, and it was on Quincy, thus inquiring if any of the dispatchers present knew of a police operation on Quincy. Ms. Marquez, who was sitting right on front of Mr. Duran, turned around and told him that there was a possible SWAT call on Quincy, but she didn't know if it was his address. Mr. Duran looked at Ms. Marquez, but did not answer her as he was still on the call.

Plaintiff argues that the dispatchers and operators personally participated in the constitution deprivations she alleges because such deprivations would not have occurred but for their conscious withholding of information from Mr. Garrison: that despite knowing of the overwhelming likelihood that the people Mr. Garrison called about were police officers, Mr. Duran did not tell this to Mr.

Garrison. She also maintains that these Defendants acted unreasonably in acquiescing to Mr. Garrison when he said he had a gun and intended to go to the back door and not telling him to remain in his house and put down the gun.

As the Court has already determined that the officers on the scene at Quincy are entitled to summary judgment on each of Plaintiff's constitutional claims, the same must be held with regard to the APD dispatchers and 911 operators. Additionally, these Defendants acts and/or omissions in no way meet the requisite level of reckless or deliberate conduct necessary to sustain a § 1983 claim. *See Sevier*, 60 F.3d at 699 & n.7.

5. Supervisory Liability, Official Capacity Liability, and Conspiracy

Having found Defendants entitled to summary judgment on Plaintiff's constitutional claims, the Court also will grant County Defendants summary judgment on her supervisory liability, official capacity liability, and conspiracy claims, (County's Motion, County's Supplemental Motion). *See Thompson*, 58 F.3d at 1517. The Court also notes that there is no evidence of any affirmative link between Sheriff Bowdich, Captain Linthicum, or Captain Stebleton and the BCSO deputies who allegedly violated Plaintiff's constitutional rights. *See Woodward v. Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992). Additionally, there is absolutely no evidence of any failure to take action, train, or supervise or longstanding custom, practice, or policy of deliberate indifference by the County Defendants regarding violations of the constitutional rights of persons with whom their subordinates came into contact. Finally, there is also no evidence of any conspiracy in this case.

State Law Claims

1. Negligence of APD Dispatchers and 911 Operators

City Defendants move for summary judgment on the state tort claims asserted against the APD radio dispatchers and 911 operators. (City's Motion No. VI.) They maintain that these individuals are immune from suit. The Court agrees.

Pursuant to the New Mexico Tort Claims Act, "any public employee while acting with the scope of duty [is] granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. N.M. Stat Ann. § 41-4-4(A)(Michie 1996 Repl. Pamph.). This general grant of immunity is waived for certain enumerated torts committed by law enforcement officers:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

Id. § 41-4-12. "Law enforcement officer" is defined as

> any full-time salaried public employee of a governmental entity whose *principal duties* under law are to hold in custody any person accused of a criminal offense, *to maintain public order* or to make arrests for crimes, or members of the national guard when called to active duty by the governor.

Id. § 41-4-3(D)(emphasis added).

Defendants Baca, Patrick, Marquez, and Duran contend that they are not "law enforcement officers" within the meaning of the Tort Claims Act. Plaintiff responds that their principal duties fall within the statutory element of "maintaining public order." Neither party has alerted the Court to any New Mexico case that addresses whether police dispatchers or 911 operators are law

enforcement officers under the Act, and the Court has found none, but other case law is informative.

Whether an individual is a law enforcement officer for purposes of the Tort Claims Act is "determined by examining 'the character of the principal duties involved, those duties to which employees devote a majority of their time.'" *Weinstein v. City of Santa Fe*, 121 N.M. 646, 650, 916 P.2d 1313, 1317 (1996)(quoting *Anchondo v. Corrections Dep't*, 100 N.M. 108, 110, 666 P.2d 1255, 1257 (1983)). Determination of whether an individual's principal duties are "to maintain public order" requires "review of the employee's day-to-day duties, responsibilities, and activities" which are then "measured against the admittedly amorphous standard of the duties and activities traditionally performed by law enforcement officers." *Coyazo v. State*, 120 N.M. 47, 50, 897 P.2d 234, 237 (Ct. App. 1995). This determination is "fact specific, but informed by a practical, functional approach as to what law enforcement entails today." *Id.* at 51, 897 P.2d at 238.

The Human Services Department's job classification and compensation descriptions for APD radio dispatchers and 911 operators respectively provide:

> General Statement of Duties
>
> [Police Dispatcher]: Operate a communications console consisting of Computer Aided Dispatch system, Enhanced 9-1-1 and two-way radio systems. Coordinate and dispatch Police Officers in response to emergency and non-emergency calls for service. Coordinate and monitor the ongoing activities of field personnel. Operate the National Crime Information center (NCIC) and Albuquerque Computerized Telecom Information Orientation Network (ACTION) and teletype machine when necessary.
>
> [9-1-1 Operator]: Receive, evaluate, prioritize and relay 9-1-1 emergency calls for medical, police and fire services which require dispatch. Receive, evaluate, prioritize and relay non-emergency and ring-down lines.

(Mem. Supp. City's Motion No. VI (Docket No. 75) Ex. A at 2, 4.)

Additionally, the "Typical Duties and Responsibilities" listed for each job are:

> [Police Dispatcher]
> 1. Receive requests for emergency and non-emergency police assistance from 9-1-1 operator. Prioritize and dispatch appropriate and available officer(s) via voice transmission and/or Computer Aided Dispatch (CAD) system.
> 2. Receive, monitor and update information via radio transmission and/or CAD system concerning status and activities of officers.
> 3. Relay applicable NCIC, teletype and other essential information to officers concerning ongoing activities.
> 4. Answer and respond to phone calls from internal and external sources and service channel requests as well as inquiries by CADs/radio from Police Officers.
> 5. Perform the same duties as the 9-1-1 Operators and operate the NCIC and ACTION terminals and teletype machines as needed.
> 6. Maintain complete logs of calls on the service channel.
> 7. Perform other duties as they relate to the job.
>
> [9-1-1 Operator]
> 1. Assume control of callers to 9-1-1, determine the nature of the emergency, obtain detailed and accurate information from the caller and relay the emergency information to the appropriate dispatcher.
> 2. Verify origination of emergency calls.
> 3. Receive, evaluate, prioritize and relay non-emergency and ring-down lines.
> 4. Maintain logs for runaways and abandoned vehicles.
> 5. Operate special hearing impaired telephones (TTY) to receive incoming calls for services.
> 6. Monitor special alarms tied into the 9-1-1 system.
> 7. May relay official and non-official messages to officers in the field.
> 8. Perform other duties as they relate to the job.

(*Id.*)

The comparison to be drawn then is " between the primary activities of the public employee in question and the normal commonplace activities of, for example a police officer on patrol." *Coyazo*, 120 N.M. at 50, 897 P.2d at 237. Applying this practical approach, it is clear that APD radio dispatchers and 911 operators are not engaged in the same activities as the officer on patrol. Rather, their duties are more analogous to those of secretaries or administrative assistants and as such, they are not "law enforcement officers." *See Weinstein*, 121 N.M. at 650 n.2, 916 P.2d at 1317

n.2 ("[P]olice secretaries and couriers would not be considered law enforcement officers under the Act because their principal duties do not include making arrests or keeping the peace."). Therefore, Defendants' Motion will be granted.

2. Assault and Battery

Officer Terry moves for summary judgement on Plaintiff's assault and battery claim. (City's Motion No. VI.) Under New Mexico law, for there to be a tortious assault, there must be an act, threat, or some other menacing conduct which causes another person to reasonably believe that he or she is in danger of receiving an immediate battery. *Baca v. Velez*, 114 N.M. 13, 15, 833 P.2d 1194, 1196 (Ct. App. 1992). Under the facts of this case, there is no way the Court can find that Mr. Garrison could "reasonably" believe that he was in danger of an immediate battery. During his first encounter with the officers, not one of them threatened him by word, action, or other menacing conduct. No officer touched Mr. Garrison, approached him, or entered his backyard. The officers identified themselves and their mission and told him to return to his house, which he did. No one followed him or interfered with him while he recrossed his backyard and none of the officers had any contact with him while he remained in his house. The APD and BCSO officers were lawfully executing a search warrant at 2615 Quincy and none of their conduct was directed at Mr. Garrison, except to order him to return to his house at 2619 Quincy. Additionally, Officer Terry did not even participate in the initial encounter with Mr. Garrison. Thus, his Motion must be granted as to the assault claim.

As to the battery claim, Officer Terry argues that he is entitled to summary judgment on grounds that he acted in good faith and with probable cause. The New Mexico Supreme Court has recognized that

> [o]fficers, within reasonable limits, are the judges of the force necessary to enable them to . . . preserve the peace. When acting in good faith, the courts will afford them the utmost protection and they will recognize the fact that emergencies arise when the officer cannot be expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in court.

Mead v. O'Connor, 66 N.M. 170, 173, 344 P.2d 478, 479-80 (1959). When Mr. Garrison reappeared at his back door and aimed his gun at Defendants, he committed the crime of aggravated assault. Perceiving an immediate threat of serious physical harm to himself and the other officers present, Officer Terry reacted in an objectively reasonable manner by shooting Mr. Garrison.

Although Plaintiff maintains that Defendants provoked Mr. Garrison and were somehow responsible for causing him to reappear with his gun and threaten them from his back door, this argument is unsupported by the facts or law. Plaintiff does not and cannot argue that Defendants had any duty to inform Mr. Garrison of their intention to serve a search warrant on his rental property. Additionally, Mr. Garrison had no legal right to point his gun at the officers or to use force in an attempt to interfere with their execution of the search warrant. *State v. Johnson*, 124 N.M. 647, 654, 954 P.2d 79, 86 (Ct. App. 1997)("[A] homicide by a private citizen . . . is justifiable only if 'necessarily committed . . . by lawful ways and means,' meaning that deadly force in the apprehension of suspected felons is justifiable only when the citizen has probable cause to believe he or she is threatened with serious bodily harm or the use of deadly force.")(quoting N.M. Stat. Ann. § 30-2-7(C)); *Brown v. Martinez*, 68 N.M. 271, 280, 361 P.2d 152, 159 (1961)("[S]ince the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury where only the property is threatened."). Therefore, Officer Terry's Motion also will be granted as to the battery claim.

3. False Imprisonment

City Defendants move for summary judgment on Mrs. Garrison's false imprisonment claim. (City's Motion No. VII.) False imprisonment involves "unlawful interference with the personal liberty or freedom of locomotion of another." *Martinez v. Sears, Roebuck & Co.*, 81 N.M. 371, 373, 467 P.2d 37, 39 (Ct. App. 1970). Confinement in jail or custody is not required, and the requisite restraint

> may arise out of words, acts, gestures or similar means which induce reasonable apprehension that force will be used if the plaintiff does not submit and it is sufficient if they operate upon the will of the person threatened and result in a reasonable fear of personal difficulty or personal injuries.

Id. Reasonable cause, however, is a defense to a claim of false imprisonment. *Diaz v. Lockheed Elecs.*, 95 N.M. 28, 30, 618 P.2d 372, 374 (Ct. App. 1980)(citing and discussing *Stienbaugh v. Payless Drug Store, Inc.*, 75 N.M. 118, 401 P.2d 104 (1965)).

Defendants maintain that they had reasonable cause to restrain Mrs. Garrison and the Court agrees. As discussed in regard to Mrs. Garrison's unreasonable seizure claim, the officers, as a matter of law, had reasonable cause to restrain her for their and her protection, to meet their community caretaking responsibilities, and to allow the investigation into the shooting to proceed. Thus, summary judgment will be granted as to Mrs. Garrison's false imprisonment claim.

IT IS HEREBY ORDERED that City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim, (Docket No. 30), filed July 17, 1997, is **GRANTED**.

IT IS FURTHER ORDERED THAT Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (Docket No. 69), filed October 24, 1997, is **GRANTED**

IN PART as to the unlawful seizure claims regarding Mr. and Mrs. Garrison, official capacity liability, supervisory liability, and conspiracy.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (Docket No. 74), filed November 5, 1997, is **GRANTED IN PART** as to the assault and battery claim against Officer Terry, and the § 1983 and state law claims against the APD radio dispatchers and 911 Operators.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VII: Qualified Immunity for Defendant Officers Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (Docket No. 85), filed January 8, 1998, is **GRANTED**.

IT IS FURTHER ORDERED that County Defendants' Supplemental Motion for Summary Judgment on Plaintiffs' Civil Rights Claims (Docket No. 108), filed August 5, 1998, is **GRANTED**.

UNITED STATES DISTRICT JUDGE