IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Augustin Plains Ranch, LLC,

Applicant-Appellant,

v. Case No. 32,705

Scott A. Verhines, P.E.,

New Mexico State Engineer-Appellee,

and,

Kokopelli Ranch *et al.*,

Protestant-Appellees.

ANSWER BRIEF

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT, CATRON COUNTY, MATTHEW G. REYNOLDS, District Judge

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Statement of Compliance: I certify that this brief was prepared using fourteen-point, proportionally spaced typeface with Microsoft Word 2007 that that the brief contains 10,571 words.

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SUMMARY OF PROCEEDINGS

Protestant-Appellees ("Protestants")[1] object to the "Summary of Proceedings" provided by Augustin Plains Ranch, LLC ("APR") as incomplete and one-sided. Therefore, pursuant to Rule 12-213(B) NMRA, Protestants deem it necessary to provide a separate "Summary of Proceedings."

I. Nature of the Case:

This is a water rights case in which APR is appealing the district court's grant of summary judgment against it. The district court upheld the state engineer's decision to deny APR's application for a permit to appropriate 54,000 acre-feet per year ("afy")[2] of underground water via thirty-seven wells to be drilled on APR's extensive ranch in Catron County, New Mexico. [**RP 872** (Memorandum Decision on Motion for Summary Judgment ("D.Ct. Decision")); **RP 904** (Order on Protestants' Motion for Summary Judgment)]. APR filed its original and amended applications for a permit to appropriate underground water pursuant to NMSA 1978, Section 72-12-3(2001). [**RP 125** (original application); **RP 68** (amended application)]. According to its application,[3] APR desires to pump underground water from its ranch in Catron County to serve any future need for water that might

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[1] "Protestants" comprise dozens of parties identified on the signature page below.
[2] This amount is equal to approximately half of that consumed by the entire City of Albuquerque.
[3] The original and amended applications are referred to herein collectively as "APR's application."

arise in seven New Mexico counties, including irrigation, domestic, municipal, commercial, industrial, recreational, environmental, subdivision, replacement, and augmentation of surface flows in the Rio Grande. [**Id.**] However, the application never discloses who specifically will use the water, what they will use it for, where they will use it, or how much water each user may require.[4]

APR does not claim to be a water supply company or other "planning entity" within meaning of NMSA 1978, 72-1-9 (2009).[5] APR also does not claim to be a public utility. It is a private corporation.

II. Course of Proceedings and Disposition before the Office of the state engineer.

APR submitted its original application to the Office of the State Engineer ("OSE") on October 12, 2007. [**RP 125**] APR filed an "amended application" on May 5, 2008, and further modified the application on June 26, 2008. [**RP 68; RP 364**] Following public notice of the original and amended applications, hundreds of individuals, corporations, and government entities filed objections to the application pursuant to NMSA 1978, Section 72-12-3 (D), causing OSE to commence an administrative hearing pursuant to NMSA 1978, Sections 72-2-16 (1973), 72-2-17 (1965), and 72-12-3 (F). [**RP 65, 104-124; 165**]

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[4] APR is only one of many possible water users.

[5] Covered entities are "allowed a water use planning period not to exceed forty years." NMSA 1978, § 72-1-9 (B).

Arguing that APR's application was legally invalid on its face, Protestants, the Middle Rio Grande Conservancy District ("MRGCD"), the Isleta Pueblo, the United States and others filed motions to dismiss the application, or concurred in such motions, or both. [**RP 337, 367, 445, 450, 457, 462, 473, 482, 499, 521, 584, 593**] Protestants argued that APR's application violated NMSA 1978, Section 72-12-3(B), because it failed to designate any specific purpose, place, and amounts of use. [**RP 337-354** (motion to dismiss); **RP 593-609** (reply brief)] Protestants argued that APR's application provided only an open-ended list of potential places and purposes of use that might or might not occur within a vast area, and that it failed to specify how the total amount of water, 54,000 afy, would be allocated among the various places and purposes of use. Protestants claimed that this lack of specificity violated the prior appropriation doctrine, as codified in New Mexico's Constitution, statutes and regulations, and that it made effective public notice impossible to provide.

APR filed a response brief but did not attach affidavits or otherwise clarify how and where it intended to use the tremendous amount of water it sought.

After extensive briefing and a hearing at which APR appeared and argued its case [**id.**, **RP 56-58**], an OSE hearing examiner prepared an Order Denying Application ("OSE Order"), which the state engineer adopted. [**RP 659** (OSE Order); see also **RP 306 at 4** (Scheduling Order calendaring hearing on threshold

issue of application's validity); **RP 647** (notice of hearing)] The state engineer held that an "application is, by its nature, a request for final action"[6] [**RP 661 ¶ 17**], and that, therefore, it "is reasonable to expect that, upon filing an application, the Applicant is ready, willing and able to proceed to put water to beneficial use." [**RP 661 ¶ 18**] The state engineer held that APR's application, on its face, failed to meet this standard. [**RP 661-662 ¶ 19**] The state engineer also found:

(1) that the application failed to specify exactly which lands APR intended to irrigate;

(2) that consideration of an application which failed to specify the intended purposes of use and the actual end-users "would be contrary to sound public policy";

(3) that "consideration of an application to pump underground water … [to] be released into [the Rio Grande] … without [specifying] … delivery points and methods of accounting for that water would be contrary to sound public policy";

(4) that consideration of "an Application that, on its face, is so vague and overbroad that the effects of granting it cannot be reasonably evaluated is contrary to sound public policy"; and that

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[6] The state engineer made similar findings in another recent administrative hearing. [**RP 373 ¶ 9**]

(5) in "keeping with NMSA section 72-5-7, Application RG-89943, filed with the state engineer on October 12, 2007 and on May 5, 2008, should not be considered by the state engineer." [**RP 662 ¶¶ 20-24**]

The state engineer denied APR's application "without prejudice to filing of subsequent applications" and dismissed the administrative proceeding. [**Id. ¶¶ 25, 26**] APR did not request any "post-decision" hearing or seek any other relief from OSE after the state engineer denied its application "without prejudice." APR instead proceeded directly to district court.

III. Course of Proceedings and Disposition before the District Court.

APR perfected a *de novo* appeal in the seventh judicial district pursuant to NMSA 1978, Section 72-7-1 (1971). [**RP 1-3, 674**] Protestants entered an appearance in the case [**RP 672**] and promptly filed a motion and memorandum for summary judgment. [**RP 684, 686, 713, 724, 768, 778, 814, 822**] Protestants essentially repeated the same purely legal arguments that they made to the state engineer. APR again filed a response brief without attaching affidavits or further clarifying how and where it intended to use 54,000 afy. [**Id.**] After extensive briefing and a hearing at which the parties appeared and presented oral argument [**RP 721, RP 861-869**], the district court granted Protestants' motion and entered summary judgment denying the application and dismissing the case. [**RP 872-903**]

IV. Synopsis of District Court's Decision on Motion for Summary Judgment.

The district court's 32-page Decision [**RP 872-903**] sets out the undisputed material facts and governing law that entitled Protestants to summary judgment under Rule 1-056 NMRA. The undisputed material facts relied on by the district court were derived solely from APR's amended application (Protestants' summary judgment Exhibit C), the modification to the amended application (Protestants' summary judgment Exhibit D), and the state engineer's decision (Protestants' summary judgment Exhibit A).[7] [Decision at 2-5, 9-11; **RP 786-792** (exhibits to Protestants' motion for summary judgment)]

The district court divided its analysis into three parts. In the first part, the court held that if APR's application failed to comply with New Mexico law, then the state engineer "was required to deny the application." [**RP 882-885**] In the second part, the court showed that APR's application violated the statutory submission requirements of NMSA 1978, Section 72-12-3, and therefore, the application failed to comply with law and thus exceeded the state engineer's statutory authority to consider or approve. [**RP 886-887**] In the third part of its analysis, the court showed that APR's application also "contradicts beneficial use as the basis of a water right and public ownership of water, as declared in the New

[7] The district court held that APR's amended application superceded its original application. [**RP 872**] The state engineer, in contrast, regarded the original and amended applications as one application. [**RP 662 ¶ 24**]

Mexico Constitution." [**RP 897-903**] Based on its three-party analysis, summarized below, the district court entered an order upholding the state engineer's decision to deny APR's application. [**RP 904**]

A. The state engineer was required to deny APR's application if it failed to comply with New Mexico law.

The district court began its analysis by first rejecting APR's basic argument in this appeal—that once the OSE staff accepted its application for filing and publication the state engineer had no choice but to conduct a trial-type evidentiary hearing. [**RP 882-884**] The court held that OSE staff's initial acceptance of an application does not diminish the state engineer's statutory duty to deny applications that violate New Mexico law.[8] [**RP 882-883**] The court further held that the state engineer's authority is limited to that which is expressly granted or necessarily implied by statute. [**RP 884**]. Therefore:

> If the application … on its face … violates New Mexico law, the State Engineer has no authority to act other than to reject the application.

[**Id.**]

[8] The court held that OSE's reliance on NMSA 1978, § 72-5-7 (1985) for rejecting underground water applications was misplaced, because this statute prescribes procedures for surface water applications. [**RP 883-884**]

B. APR's application does not specify the beneficial purposes and places of use of water, and therefore, it violates NMSA 1978, Section 72-12-3 and exceeds the state engineer's authority to consider or grant.

The district court held that APR's application violated the basic statutory submission requirements spelled out in Subsections 72-12-3(A)(2) and (A)(6), because it "fails to specify the beneficial purpose and place of use of water." [**RP 886-897**] The court rejected APR's argument that it need not disclose any actual purpose and place of use until an evidentiary hearing is conducted. [**RP 886-887**] The court noted that the application's "inherent ambiguity" precluded the state engineer from evaluating the application for impairment to existing water rights, public welfare, and conservation of water, as mandated by NMSA 1978, § 72-12-3. [**RP 887, 888-889, 891, 896**]

Relying on statutory construction, seminal New Mexico case law, and learned treatises on prior appropriation, the court concluded that Section 72-12-3 requires applicants to disclose a present intention to appropriate water in a specific amount, for a specific purpose, and in a specific place.[9] [**RP 889-891, 893-895**] The court concluded that APR's vague application failed to meet this standard, giving rise to several legal and practical problems. For example:

> By choosing all of the named options [for use] and including several more, there was no narrowing down or selection of use in the application itself, there was just an "all of the above" approach. As for

[9] However, the court held that the statute allows multiple purposes and places of use. [**RP 887-889**]

> place of use, designating "any" area within the seven-county Middle Rio Grande watershed opened up great uncertainty as to where Applicant's pipeline would go and where it would be actually used, because the word "any" is a general term rather than specific. [**RP 888**]
>
> The State Engineer's difficulty in analyzing the application stems from the application's inherent ambiguity. [**RP 891**]
>
> Because Applicant failed to specify beneficial uses and places of use in its application and chose to make general statements covering nearly all possible beneficial uses and large swaths of New Mexico for its possible places of use, the State Engineer had no choice but to reject the application. **[Id.]**
>
> Because of the confusion between the application's stated pipeline purpose and the uncertain amounts to be used for irrigation on APR, the current application is invalid for lack of clarity. [**RP 892**]
>
> But the application under review just outlines general potential uses and places of use; it does not describe what actually is to be the purpose and place of use. Rather than being the "first step" in obtaining a water right, the application demonstrates that Applicant is merely contemplating possible steps, like a player holding onto a chess piece before committing to a particular move. [**RP 892**]

As the court noted, even APR admits that "[h]ow and whether [APR] will be able to put water to beneficial use is an issue that cannot be determined from the Application alone." [**RP 896**]

To further bolster its conclusion that Section 72-12-3 requires specificity as to purpose and place of use, the court observed that Subsection D requires objectors to an application to "prove that 'they **will be** substantially and **specifically** affected by the granting of the application.'" [**RP 889** (quoting NMSA

1978, § 72-12-3(D)(2001) (emphasis in original)] The court found it "would be anomalous for an applicant to be allowed to give general statements of intent to appropriate water for beneficial use yet require specificity for objectors." [**RP 889-890**]

Relying on Samuel C. Weil's "landmark" treatise on western water law and New Mexico case law, the court held that neither the common law nor the permitting statutes "contenance anyone acting 'the dog in the manger,' referring to Aesop's fable of the dog that blocks cattle from feeding even though the dog itself has no appetite for hay." [**RP 895**] Nor did the law allow monopolization "of waters by merely posting ... notices or making a pretense of building canals, ditches, etc." [**Id.**] APR's application contradicts these basic principles because, if approved, it would grant APR a monopoly over a vast supply of water. APR would become "the dog in a very large manger, an entire underground water basin."[10] [**RP 895-896**] The district court observed:

> Applicant's claim over water, in the amount of 54,000 afy, is larger than the maximum water supply available for the Carlsbad Irrigation District's many users.[11] This illustration from one watershed demonstrates the enormous potential available for Applicant to monopolize the waters that would have otherwise been available to other users wishing to apply the underground waters of the San Agustin Basin to beneficial use.

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[10] The court is referring to the San Augustine groundwater basin, which is within the declared Middle Rio Grande Underground Basin.

[11] The district court took judicial notice of the Pecos River settlement, which allots a water supply of 50,000 afy to the entire Carlsbad Irrigation District or CID.

[**RP 896**]

In concluding that APR's application was beyond the state engineer's statutory authority to grant, the court held:

> In reviewing the application in light of the permitting statute's language, context, history and purpose, there is no genuine issue of material fact as to the application's invalidity regarding purpose and place of use. ... With no details for all of the required elements of a water permit, the State Engineer could not perform his statutory duties under NMSA 1978, § 72-12-3(E) (2001) of determining whether the proposed appropriation would impair existing rights, be contrary to the conservation of water, or be detrimental to the public welfare. As a matter of law, the State Engineer could not allow an applicant to hold up other uses of water under the doctrine of relation, when the applicant broadly claims a huge amount of water for any use and generalizes as its place of use "any area" in seven counties in the Middle Rio Grande Basin, covering many thousands of square miles.

[**RP 896-897**]

C. APR's application contradicts the principles of beneficial use and public ownership of water, as declared in the New Mexico Constitution.

In addition to violating statutory application requirements, the district court held that APR's application violated the constitutional principles of beneficial use and public ownership of water. [**RP 897-903**]

1. APR's application violates the principle of beneficial use as the basis of a water right.

The district court held that APR's application violated this principle because it failed to specify how APR actually intends to use a vast quantity of water. On its

face the application discloses only a naked intention to divert underground water via 37 wells and pipe it to indefinite locations for unclear purposes. [**RP 897-899**] The court held that this vagueness contradicts the prior appropriation doctrine, which is "based on imperative necessity ... and **aims fundamentally at definiteness and certainty**." [**RP 898** (quoting State ex rel. Martinez v. City of Las Vegas, 2004 NMSC 9, ¶ 34, 135 N.M. 375, 89 P.3d 47 (other citations omitted) (emphasis in original)] Relying on Millheiser v. Long, 10 N.M. 99, 61 P. 111 (1900) and other New Mexico cases, the court held that the mere intention and ability to divert water is not sufficient to establish a water right; there must also be a specific intent to divert the water to some beneficial use. [**RP 897-899**]

2. APR's application violates the principle of public ownership of water.

The district court held that APR's application violates this principle because it would effectively transfer ownership of a vast supply of underground water from the public to a private corporation. [**RP 899-900**] As the court observed:

> Water belongs to the state which authorizes its use. The use may be acquired but there is no ownership in the corpus of the water. ... **The state as owner of water has the right to prescribe how it may be used**. ... The public waters of this state are owned by the state as trustee for the people.

[**RP 900** (quoting Tri-State Generation & Transmission Ass'n v. D'Antonio, 2012 NMSC 039, ¶ 41, 289 P.3d 1232) (citations omitted) (emphasis in original)]

Accordingly, the court held that APR's application violated yet another principle of New Mexico water law:

> If Applicant's plan for a major diversion project were approved, the people of New Mexico would thereby receive a benefit, according to Applicant, of a steady water supply that could accommodate many existing and new uses along the Rio Grande at a time when there is growing stress on this precious resource. But Applicant's offer would come at a heavy price, that price being the relinquishment of the public's constitutionally guaranteed ownership of the state's waters. Under de novo review, this Court finds that, as a matter of law, the application violates the sound policy of public ownership in the waters of this state as declared in the New Mexico Constitution.

[**RP 903**] The district court thereafter entered an order upholding the state engineer's denial of APR's application for the reasons specified in its Memorandum Decision. [**RP 904**]

V. Additional Facts Relevant to the Issues Presented for Review.

The following facts are also relevant to the issues presented for review:

(1) On its original application [**RP 126-138**] APR designates the "purpose of use" as "domestic, irrigation, municipal, industrial, and commercial," checking off every category of use available on the application form. [**RP 127**]. For "specific use" the application refers to "Attachment B." [**Id.**]

(2) On Attachment B to its original application APR claims, among other things, that the underground water "basin contains an extraordinary amount of potable groundwater in storage that could sustain diversions of 54,000 [afy] for a period of 300 years." [**RP 133**] APR identifies several possible uses, such as

supporting "municipalities in the region, including Datil, Magdalena, Socorro, New Mexico"; "real estate development" on APR's ranch; "commercial agricultural" on APR's ranch; and "potential uses ... that could support ... New Mexico" such as "providing water to the State ... to ... augment its capacity to meet compact deliveries to the State of Texas ...." **[RP 133-134]**

(3) APR's original and amended applications identify the location of the thirty-seven wells on APR's ranch in Catron County. **[RP 68, 72-75, 126, 131-132]**

(4) The purpose of use designated in APR's amended application is the same as the original except that it adds "environmental, recreational, subdivision and related, replacement and augmentation" as possible additional uses. **[RP 68]** The amended application further provides that the "purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the" seven-county place of use. **[RP 69]** Where the application form required identification of a "specific use," APR left the form blank. **[RP 68]**

(5) APR designated the "place of use" on its amended application as "any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico." **[RP 69, 82-83]**

(6) In an email to OSE staff, one of APR's attorneys stated "[To] the extent that the applied-for water will be used for irrigation on [APR's] Ranch, the irrigation will be limited to 120 acres within a 1,290 foot radius of each of the 37 well locations ... The total acreage to be irrigated on APR will be 4440 acres." [**RP 364**] This information was not included in any public notice.

ARGUMENT

VI. STANDARD OF REVIEW.

An appeal from the grant of summary judgment presents a question of law and is reviewed de novo. Self v. United Parcel Serv., Inc., 1998 NMSC 46, ¶6, 126 N.M. 396, 970 P.2d 582. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Id.; Rule 1-056 NMRA. "To avoid summary judgment a party opposing the motion should produce specific evidentiary facts that demonstrate a need for a trial on the merits." Cates v. Regents of the N.M. Inst. of Mining & Tech., 1998 NMSC 2, ¶24, 124 N.M. 633, 954 P.2d 65. Because APR did not identify any disputed material facts in its response to summary judgment [**RP 778-811, RP 824-826**], all material facts set forth in Protestant's memorandum in support [**RP 689-693**] are deemed admitted. Rule 1-056(D) & (E) NMRA. Additionally, the state engineer's order denying APR's application "is presumed to be in proper

implementation of the provisions of the water laws administered by him." NMSA 1978, § 72-2-8(H) (1967).

VII. APR RECEIVED A PRE-DECISION HEARING THAT COMPLIED WITH THE GOVERNING STATUTES, AND IT IS NOT ENTITLED TO AN "EVIDENTIARY" HEARING ON A LEGALLY INVALID APPLICATION.

The record below shows that APR was afforded **two** hearings at which it defended its application—one hearing before the state engineer and second before the district court on *de novo* appeal. APR's lawyers filed response briefs and personally appeared at both hearings. APR did not request to present live testimony at the hearings, did not attach affidavits to its response briefs, and did not otherwise indicate that there was any genuine issue of material fact. Nevertheless, APR's entire brief in this appeal is devoted to arguing that the governing statutes give it an absolute right to an evidentiary hearing. [See, e.g., BIC-in-Chief ("BIC") at 10-12, 14-17, 23, 25, 30, 38, 40] APR is mistaken. Although the statutes grant APR and all applicants the right to one hearing before the state engineer, they do not require the state engineer to conduct an **evidentiary** hearing on applications that fail to comply with law. The state engineer can properly deny such legally invalid applications on dispositive motion, provided he allows adequate briefing and conducts a hearing at which the parties personally appear. This is what the state engineer did in this case, which is all that the governing statutes require.

A. The Legislature granted OSE hearing examiners broad discretion to control administrative hearings, including the discretion to consider and grant dispositive motions without conducting any evidentiary hearing.

The first indication that the governing statutes do not grant APR an absolute right to an evidentiary hearing is the fact that these words, "evidentiary hearing," never appear in the statutes. NMSA 1978, §§ 72-2-16, 72-2-17, & 72-12-3. In contrast, in the few instances where the Legislature truly wanted to mandate an evidentiary hearing, it did so using express and unequivocal language. See NMSA 1978, § 24-1-15 (2002) (person alleged to have contagious disease held in custody pursuant to *ex parte* protective order entitled to evidentiary hearing); NMSA 1978, § 24-1-15.1 (2009) (person alleged to have tuberculosis held in custody pursuant to *ex parte* protective order entitled to evidentiary hearing); NMSA 1978, § 31-20-6 (2007) (requiring evidentiary hearing to determine defendant's inability to pay supervised probation costs); NMSA 1978, § 31-21-10 (2009) (same). The Legislature clearly knows how to draft statutes that mandate evidentiary hearings. The "fact that [it] did not do so" in the statutes at issue here "is compelling evidence that the legislature did not intend" to mandate evidentiary hearings in administrative proceedings before the state engineer. See Hanson v. Turney, 2004 NMCA 69, ¶12, 136 N.M. 1, 94 P.3d 1.

Rather than mandating evidentiary hearings in every case, the Legislature granted OSE hearing examiners substantial discretion to regulate administrative hearings as appropriate:

> In the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform acts and to take all measures necessary or proper for the efficient and orderly conduct of such hearing ....

NMSA 1978, § 72-2-12 (1965). As APR itself argued, this and other "enabling statutes grant the state engineer and hearing examiners ... broad authority over the procedures and conduct of hearings." [**RP 621-622**]. Similar language is used in Rule 53(c) of the Federal Rules of Civil Procedure regarding special masters. The Ninth Circuit held that such language gave masters broad discretion to conduct evidentiary hearings but did not require them to do so. United States v. Clifford Matley Family Trust, 354 F.3d 1154, 1159-1161 (9th Cir. Nev. 2004). Furthermore, Section 72-2-17 expressly anticipates the filing of "motions" and provides that "any part of the evidence may be received in written form" so long as the parties are not prejudiced. NMSA 1978, §§ 72-2-17(B)(2) & (C)(1) (1965). This express authority and that provided under Section 72-2-12 grant hearing examiners ample discretion to consider and grant dispositive motions like those allowed under Rules 1-012(b)(6) and 1-056 NMRA.

The history of Section 72-2-16 cited by APR further undermines its claim of entitlement to an evidentiary hearing. As APR points out [BIC at 29], for a short

period of time the Legislature forbid the state engineer from denying an underground water application if the applicant timely filed "an action" in district court. But see Hobbs v. State, 82 N.M. 102, 103, 476 P.2d 500, 501 (1970) (declaring that this historical statute, NMSA **1953**, § 75-11-3, unconstitutional). APR incorrectly reasons that, since the Legislature once ".... granted ... an applicant the right to an **evidentiary hearing** *in the district court*," applicants must have the same right in administrative hearings before the state engineer. [BIC at 29 (italics in original, bold font added)] What APR fails to acknowledge, however, is that these statutory district court actions were "heard and tried as cases originally docketed ...," Hobbs at 103, 476 P.2d at 501. In "cases originally docketed" district courts routinely consider and grant dispositive motions under the Rules of Civil Procedure without ever conducting an evidentiary hearing. Therefore, if the type of hearing afforded is supposed to be identical but the "tribunal designated to conduct the hearing shifted" from district court back to the OSE, as APR argues [BIC at 30], then dispositive motions are proper in OSE administrative hearings to the same extend they are in district court.

B. Derringer v. Turney does not compel the state engineer to provide APR an evidentiary hearing on a legally invalid application to appropriate underground water.

Contrary to APR's claim [BIC 33], nothing in Derringer v. Turney, 2001 NMCA 75, ¶13, 131 N.M. 40, 33 P.3d 40, compels the state engineer to conduct a

trial-like "evidentiary" hearing in every case in which his staff accepts an underground water application for filing and publication. In Derringer, the party opposing Derringer (the Chapels) moved for summary judgment in an administrative hearing before the state engineer. Id. ¶ 3. After Derringer opposed the Chapels' request for a hearing on their motion, the state engineer denied the hearing request and decided the case against Derringer based solely on the written briefs. Id. It was undisputed "that Derringer … did not receive a hearing" prior to the state engineer's decision, *i.e.*, Derringer was afforded no "pre-decision hearing." Id. ¶10.

On appeal, however, the "state engineer argue[d] … that Derringer was granted a pre-decision hearing because he had an opportunity to be heard in writing, at a meaningful time and in a meaningful manner." Id. ¶ 15. This Court disagreed, holding that a "pre-decision hearing … based **solely** [on] the written pleadings of the parties" violated the hearing requirements of Sections 72-2-16 and 72-2-17. Id. (emphasis added). The Court so held, not because the state engineer decided the case on summary judgment, but because Derringer was not afforded an opportunity to appear at a hearing in person and present his case to the state engineer. Id. In contrast, and consistent with this Court's holding in Derringer, APR was afforded a hearing at which it appeared to argue its case.

C. Lion's Gate Water v. D'Antonio does not compel the state engineer to provide APR with an evidentiary hearing on a legally invalid application to appropriate underground water.

In claiming an absolute right to an evidentiary hearing APR relies most heavily on Lion's Gate Water v. D'Antonio, 2009 NMSC 57, 147 N.M. 523, 226 P.3d 622. [BIC at 11, 17-20, 24-26, 27, 30, 33, 46] Lions Gate involved a narrow legal issue concerning an application to appropriate surface water, not underground water. The case does not support APR's claim to an evidentiary hearing.

The Supreme Court decided Lion's Gate on a petition for *writ of certiorari* filed by the state engineer to overturn an interlocutory decision of the district court. The sole issue was whether the district court had jurisdiction to consider any issue other than the availability of unappropriated water. Although the procedural history is convoluted, Lion's Gate filed a district court appeal of the state engineer's denial of its application to appropriate surface water from the Gila River. The sole basis of the state engineer's decision to deny, which he made on summary judgment, was that no unappropriated water is available in the Gila River. Lion's Gate ¶ 13.

On *de novo* appeal the district court entered an interim order in which it improperly asserted jurisdiction to conduct "a trial de novo" on "all matters either presented or which might have been presented to [the state engineer] as well as new evidence developed since the administrative hearing." Id. ¶¶ 1, 16. The

Supreme Court reversed this order, holding that the district court exceeded its jurisdiction:

> We hold that the district court is limited to a de novo review of the issue before the State Engineer, which was solely whether water is available for appropriation.

Id. ¶ 2. In other words, the district's court's jurisdiction on *de novo* appeal cannot exceed the jurisdiction of the state engineer. Id. ¶2 (holding that "the district court's scope of appellate review" is limited "to a de novo consideration of issues within the state engineer's statutorily-defined jurisdiction").

The Supreme Court carefully pointed out that this jurisdictional limitation applies only in one unique circumstance:

> Only when the State Engineer makes an initial determination that water is unavailable to appropriate is the State Engineer, and consequently the district court, jurisdictionally limited to consideration of that issue. Otherwise, following a determination that water is available to appropriate, the State Engineer must consider the full merits of an application and every constituent issue would be reviewable de novo on appeal.

Id. at ¶31. This unique jurisdictional limitation makes sense, because only "unappropriated water" is subject to appropriation and thus within the state engineer's permitting jurisdiction under the New Mexico Constitution and governing statutes. N.M. Const. Art. XVI, § 2; NMSA §§ 72-5-6 (1985), 72-5-7 (1985), and 72-12-3(E). Thus, upon finding no unappropriated water available, the state engineer not only lost jurisdiction to consider the merits of the Lion's Gate

application; he lost jurisdiction to consider the merits of **any** application to appropriate surface water from the Gila River.[12]

APR pins its alleged entitlement to an evidentiary hearing almost exclusively on the Supreme Court's *dicta* in Lion's Gate that, "following a determination that water **is** available to appropriate, the state engineer must consider the full merits of an application." [BIC at 46 (emphasis added)] APR reads far too much into this *dicta*. Lion's Gate stands for the proposition that "the full merits of an application" are irrelevant and beyond the state engineer's jurisdiction to consider if, and only if, the state engineer makes an initial finding of "no available unappropriated water." Lion's Gate ¶26 ("The effect of such an initial finding is to limit the state engineer's adjudicative jurisdiction over the application."). However, if the state engineer initially decides that water **is** available, then he has jurisdiction to consider "the full merits of an application" and a statutory duty to exercise that jurisdiction.

Although APR confounds the two concepts, nothing in Lion's Gate suggests that our Supreme Court always equates "hearings on the merits" with "evidentiary hearings." Indeed, like the statutes that govern administrative hearings before the state engineer, Lion's Gate never mentions "evidentiary hearing." "Cases are not

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[12] The only possible exception, unique to the Gila, is "new" water made available by a federal reclamation project under the Arizona Water Settlements Act. Lion's Gate ¶ 6.

precedent for issues not raised and decided." State v. Cortez, 2007 NMCA 54, 16, 141 N.M. 623, 159 P.3d 1108. Moreover, dismissals based on dispositive motions, such as those provided for under Rules 1-012(b)(6) and 1-056 NMRA, are decisions "on the merits" if they entirely dispose of the case and thus constitute final, appealable judgments. Cordova v. Taxation & Revenue, Prop. Tax Div., 2005 NMCA 9, 38, 136 N.M. 713, 104 P.3d 1104 ("a summary judgment is a decision on the merits of the case"); Blancett v. Dial Oil Co., 2008 NMSC 11, 16, 143 N.M. 368, 176 P.3d 1100 (motion to dismiss based on improper venue dispositive of case); cf. Handmaker v. Henney, 1999 NMSC 43, 7, 128 N.M. 328, 992 P.2d 879 (for purposes of appeal, an "interlocutory order which fails to dispose of the merits of the action ... is ... not a final decision"); Trujillo v. Gonzales, 106 N.M. 620, 621, 747 P.2d 915, 916 (1987) (upholding dismissal based on dispositive legal issue); see also Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits").

Nothing in Lion's Gate precludes the state engineer or district court from denying an application based solely on a dispositive legal issue. In fact, as the Court observed:

> The district court has not ruled whether the state engineer's grant of summary judgment was proper.

Lion's Gate ¶15. The only indication in the case that summary judgment might not be "proper" was that, according to Lion's Gate, material facts were in dispute. Lion's Gate ¶13. If Lion's Gate was correct, then summary judgment was not appropriate **in that case**, not as a general rule.

As APR points out [BIC 11], the Supreme Court was concerned that improper partitioning of issues before the state engineer could lead to piecemeal appeals. Lion's Gate ¶ 31. This policy concern, however, does not compel the state engineer, the district court, and the parties to go on litigating a moot case that is properly dismissed based on a dispositive legal issue. As already discussed, hearing examiners have the power to consider and decide dispositive motions like those allowed under Rules 1-012(b)(6) and 1-056 NMRA. These rules provide for disposal legally meritless claims early in the game, thus saving time and expense for all concerned.

Dispositive motions in state engineer proceedings do not create a "piecemeal appeals" problem, anymore than they do in district court proceedings. This is because no judgment is ever "final and appealable" unless it entirely terminates the case in the lower tribunal. Sunwest Bank v. Nelson, 1998 NMSC 12, 8, 125 N.M. 170, 958 P.2d 740; Mimbres Valley Irrigation Co. v. Salopek, 2006 NMCA 93, 22, 140 N.M. 168, 140 P.3d 1117 (holding "that no final, appealable order was entered in the district court because further proceedings are contemplated.") In this case,

both the state engineer and the district court determined that APR's application was legally invalid on its face. This was a decision "on the merits" that fully disposed of APR's application. Accordingly, there has been no improper partitioning of issues and no violation of the policy against piecemeal appeals.

D. OSE staff's acceptance of APR's invalid application for filing and publication did not compel the state engineer to provide APR with an evidentiary hearing or otherwise estop the state engineer from determining that the application was legally invalid on its face.

Contrary to APR's argument [BIC 31-32], the state engineer is not precluded from denying an application that violates the governing law after his staff accepts the application for filing and publication. First, in rejecting APR's application the state engineer complied with Section 72-12-3(C). This statute mandates rejection of an application "unless it is accompanied by all the information required by Subsections A and B of this section." Second, although his staff erred in accepting the application, nothing prevents the hearing examiner and the state engineer from correcting this error. Cf. Hanson ¶21 ("The fact that an agency overlooked a particular requirement in one case does not estop it from enforcing the requirements in another case"); NMAC § 19.27.1.12 ("issuance of a notice for publication does not in any way indicate favorable action on the application by the state engineer").

Finally, APR's contrary argument sounds in estoppel, which generally does not apply against the State in matters concerning water. State ex rel. Reynolds v.

Fanning, 68 N.M. 313, 317, 361 P.2d 721, 724 (1961); see also State ex rel. Erickson v. McLean, 62 N.M. 264, 274, 308 P.2d 983, 989 (1957). Moreover, the error of OSE staff in accepting APR's application does not prevent Protestants from pointing out the error and seeking dismissal in accordance with law. Protestants' statutory rights of due process are equal to those of APR, including the right to address "all issues involved." NMSA 1978, § 72-2-17 (B) ("opportunity shall be afforded **all** parties to appear and present evidence and argument") (emphasis added).

E. Colorado case law does not compel the New Mexico state engineer to provide APR an evidentiary hearing on a legally invalid application to appropriate underground water.

APR claims that Colorado v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (Colo. 1983) supports its alleged absolute right to an evidentiary hearing. [BIC at 26-27] Southwestern was based on Colorado's "statutory scheme for adjudication of rights to tributary ground water." Id. at 1321. Although APR fails to acknowledge it, there critical differences between Colorado's and New Mexico's statutory schemes. These differences completely undermine the precedential value of Southwestern in New Mexico.

Under Colorado's statutory scheme, an application to establish a water right through future beneficial use, called a "conditional water right," is filed with a water court. C.R.S. 37-92-302. Unlike New Mexico's permitting statute, NMSA

1978, Section 72-12-3(A), an application in Colorado need not designate the "place of use" and other critical details of a proposed appropriation. In re Application for Water Rights, 993 P.2d 483, 491 (Colo. 2000); Southwestern at 1321 ("Subsection (2) of section 37-92-302 states that the application shall contain 'a legal description of the diversion or proposed diversion, a description of the source of the water, the date of the initiation of the appropriation or proposed appropriation, the amount of water claimed, and the use or proposed use of the water.'")

Also in contrast to New Mexico, the "purpose of a conditional water decree has always been to allow an ultimate appropriation of water to relate back to the time of the 'first step' toward that appropriation." Rocky Mountain Power Co. v. Colorado River Water Conservation Dist., 646 P.2d 383, 387 (Colo. 1982). Thus, in Colorado, notice of intent to appropriate is provided today in large part the same as it was in the Nineteenth Century. In New Mexico, however, priority relates back to the filing of an application.

Under Colorado law, the intent of the appropriator, the priority date of a water right, and notice to third parties are still all dependent upon a fact-intensive inquiry into whether and what "first step" an appropriator actually took "towards an appropriation." Vought v. Stucker Mesa Domestic Pipeline Co. (In re Vought), 76 P.3d 906, 911-912 (Colo. 2003). This "first step … is complete when overt acts

coalesce to *openly demonstrate the applicant's intent to appropriate the water for a beneficial use*." Id. at 912 (emphasis added). Moreover:

> The overt act or acts must fulfill three functions: (1) manifest the necessary intent to appropriate water to beneficial use; (2) demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) constitute inquiry notice to interested persons of the nature and extent of the proposed demand upon the water supply.

Id. Only if the appropriator satisfies these requirements through physical acts does its priority relate back to the "first step," and then only if it also "diligently pursued [the appropriation] to completion." Id. at 911-912. Given the nature of this fact-intensive inquiry, motions to dismiss based solely on the contents of an application are generally inappropriate in Colorado.

In New Mexico, unlike Colorado, the filing and publication of an application has completely replaced the "first step" doctrine. Rather than physical actions on the ground, it is the application that manifests the applicant's intent to appropriate water in New Mexico. Therefore, because no trial is needed to discern the contents of APR's application, Southwestern has no precedential value in New Mexico.

VIII. THE DUE PROCESS CLAUSE OF THE CONSTITUTION DOES NOT ENTITLE APR TO AN EVIDENTIARY HEARING ON A LEGALLY INVALID APPLICATION.

Contrary to its claims [BIC 23, 38, 40], APR is not entitled to an evidentiary hearing under the Due Process Clause of either the New Mexico or United States Constitutions. "Due process requires that '[n]o person shall be . . . deprived of life,

liberty, or property, without due process of law.'" Tri-State ¶37 (quoting U.S. Const. Amend. V). New Mexico's constitutional guaranty of due process is similar to that under the United States Constitution. Bounds v. State ex rel. D'Antonio, Opinion (N.M. S.Ct. Doc. No. 32,717, July 25, 2013), 2013 N.M. LEXIS 254. "In order to assert a procedural due process claim" under either Constitution, "a plaintiff must establish deprivation of a legitimate liberty or property interest and that he was not afforded adequate procedural protections." Tri-State ¶37 (internal quotation omitted); see also Starko, Inc. v. Gallegos, 2006 NMCA 85, 17-18, 140 N.M. 136, 140 P.3d 1085 ("The first step in a procedural due process claim is to identify the state-created substantive right at stake and determine whether this right triggers procedural due process protections.").

A. APR was not deprived of a property interest.

The denial of APR's application did not deprive APR of a water right, and therefore, it has no constitutional due process claim. Bounds ¶ 54 ("Without a deprivation of property, there can be no due process violation.") APR does own land, but the mere ownership of land implies no right to appropriate the public water beneath the land:

> The substance of the [appellants'] contention that he has a vested interest in the title to the water under his lands, to the center of the earth .... This question was settled by this court in Yeo v. Tweedy, supra. It was held in that case that the title to the [underground] water ... belonged to the public and was subject to appropriation for beneficial uses.

State ex rel. Bliss v. Dority, 55 N.M. 12, 20, 225 P.2d 1007, 1012 (1950). Furthermore:

> All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. . . . The state as owner of water has the right to prescribe how it may be used.

State ex rel. Erickson v. McLean, 62 N.M. 264, 271, 308 P.2d 983, 987 (1957). Accordingly, APR has no vested property interest in public water, and thus no valid claim of deprivation. Tri-State ¶40; Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 110, 835 P.2d 819, 826 (1992) ("Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property;") cf. Tri-State ¶¶ 41-43 (holding that the state engineer's priority regulation of vested water rights did not, on its face, implicate procedural due process).

B. The procedure below satisfied constitutional due process requirements.

Even if APR has a valid property interest at stake, which it does not, the procedure below comported with constitutional due process. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' … All that is necessary is that the procedures be tailored, in light of the decision to be made,' to 'the

capacities and circumstances of those who are to be heard, … to insure that they are given a meaningful opportunity to present their case." Mathews v. Eldridge, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Moreover:

> [Although constitutional] due process guarantees 'some kind of hearing . . . at some time before a person is finally deprived of his property interests,' Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978), a full evidentiary hearing is not required in every case, see Mathews, 424 U.S. at 333-34 …. Rather, the type of hearing required depends on the circumstances.

Clifford Matley Family Trust at 1162. No evidentiary hearing was required to protect APR's right of due process in the proceedings below.

APR was provided notice and afforded a meaningful opportunity to present its case. It took full advantage of this opportunity before both the state engineer and on *de novo* appeal before the district court. A team of capable lawyers represented APR. It received notice of the dispositive motions against it in the state engineer and district court proceedings, and it fully briefed and then extensively argued its case at two hearings that each lasted several hours. It did not request to present live testimony at either hearing; nor did it attach any affidavits to its response briefs or otherwise allege the existence of an issue of material fact.

> "[P]rocedural due process [is] not violated where [the] petitioner [was] given opportunity to address [an] issue by memorandum."

Santa Fe Exploration at 110, 835 P.2d at 826 (citing Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 325 (10th Cir.1984).

Furthermore, an evidentiary hearing in this case would add no value. It would only waste considerable public resources without reducing the risk of erroneous deprivation. Mathews at 335. The only issue below was whether APR's application was invalid on its face—a purely legal issue that requires no trial to resolve. And finally, APR's application was dismissed "without prejudice," meaning that it can simply file another application with the state engineer. Therefore, APR was deprived of nothing of constitutional significance and the procedures afforded it violate no constitutional right of due process.

IX. ASSUMING *ARGUENDO* THAT THE STATE ENGINEER DID NOT AFFORD APR A PRE-DECISION HEARING, THEN APR FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES AND WAIVED ITS RIGHT TO ANY POST-DECISION HEARING.

APR's appeal is based entirely on two false premises: (1) the state failed to afford APR a "pre-decision" hearing, and (2) APR has an absolute right under Section 72-2-16 to a "post-decision evidentiary hearing." [See, e.g., BIC 32, 33, 37-39]. That these are false premises is shown in Part VII above. However, even assuming *aguendo* that APR did **not** receive a pre-decision hearing that complied with Section 72-2-16, APR clearly waived whatever right it had to a post-decision hearing and thus failed to exhaust its administrative remedies. This fact alone requires affirmance of the district court.

Section 72-12-3(F) gives the state engineer complete discretion to deny any application without providing a pre-decision hearing, even after his staff accepts

the application for filing and publication. If the state engineer denies an application without conducting a pre-decision, then he must "notify the applicant of his action by certified mail sent to the address shown in the application." NMSA 1978, § 72-12-3(F). The applicant then has "thirty days after receipt by certified mail of notice of the decision" to request a post-decision hearing. NMSA 1978, § 72-2-16. After receiving a timely request, the state engineer must conduct the post-decision hearing because the "plain language [of Section 72-2-16] guarantees an aggrieved party one hearing." Derringer, 2001 NMCA 75, ¶13.

Nothing in the record demonstrates that APR made a timely request for a post-decision hearing under Section 72-2-16. Although APR demanded an "evidentiary hearing" in its response to Protestants' motion to dismiss [BIC 32], this demand occurred **before** the state engineer entered his decision denying APR's application. APR did not request a hearing **after** the state engineer denied its application. Instead of requesting any post-decision relief from the state engineer, APR chose to proceed directly to district court. This tactical move constitutes a waiver of whatever right APR may have had to a post-decision hearing.

The "right to a post-decision hearing ... under Section 72-2-16" is "condition[ed] ... on a party's timely request," and the failure to make such a request constitutes a waiver. D'Antonio v. Garcia, 2008 NMCA 139, ¶¶ 9 & 10, 145 N.M. 95, 194 P.3d 126. By failing to make a timely request APR waived

whatever right it had to a "post-decision" hearing. Id. ¶10. It also failed to exhaust administrative remedies on its alleged entitlement to such a hearing. See Headen v. D'Antonio, 2011 NMCA 58, ¶19, 149 N.M. 667, 253 P.3d 957. As a result, neither this Court nor the district court has jurisdiction to consider APR's alleged right to a post-decision hearing. Id.

X. THE DISTRICT COURT'S JUDGMENT SHOULD BE UPHELD, BECAUSE APR'S APPLICATION IS LEGALLY INVALID ON ITS FACE AS A MATTER OF LAW.

APR's application seeks authorization (1) to pump 54,000 afy of groundwater, (2) for use in an area comprising tens of thousands of square miles, (3) to serve any conceivable purpose that might arise. APR admits that it does not know how, when, how much, or by whom water will actually be used at any particular location.[13] Contrary to APR's claim [BIC 39-46], its lack of any *bone fide* present intent to appropriate water violates basic principles of prior appropriation, as codified in New Mexico's Constitution and permitting statutes. Therefore, the district court and the state engineer correctly denied APR's application.

A. APR's application violates the prior appropriation doctrine, as codified in New Mexico's Constitution, statutes, and regulations.

"Under the doctrine of prior appropriation, water rights are both established and exercised by beneficial use, which forms 'the basis, the measure and the limit

[13] APR's response to summary judgment did not provide any further explanation.

of the right to use of the water.' N.M. Const. art. XVI, § 3." Walker v. United States, 2007 NMSC 38, ¶22, 142 N.M. 45, 162 P.3d 882. The "principle of beneficial use ... is based on 'imperative necessity' ... and aims fundamentally at definiteness and certainty." Las Vegas, 2004 NMSC 9, ¶ 34. The aim of "definiteness and certainty" dictates that water rights be defined by specific "elements," including "point of diversion, place of use, purpose of use, priority date, amount of water, [and] periods of use"); see also NMSA 1978, § 72-4-19 (1953) (mandating adjudication of all water rights by their elements).

Section 72-12-3 requires applicants to "designate," and publish notice of, the specific elements of the water right they seek. As pertinent to this appeal, applicants must "designate ... (2) the beneficial use to which the water will be applied ..., (3) the location of the proposed well, (6) the place of the use for which the water is desired, and ..., (7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land." NMSA 1978, § 72-12-3(A). Upon approval by the state engineer, the resulting permit is defined by and limited to the specific elements designated in the application. The state engineer defines a "permit" as:

> A document issued by the state engineer that authorizes the diversion of water from ***a specific*** point of diversion, for ***a particular*** beneficial use, and at ***a particular*** place of use, in accordance with the conditions of approval. A permit allows the permittee to develop a water right through the application of water to beneficial use, in

> conformance with the permit's conditions of approval. A permit in itself does not constitute a water right.

NMAC § 19.26.2.7 (W) (emphasis added). If the permittee applies water to beneficial use in accordance with the permit, the priority of the resulting water right relates back to the filing and publication of the application. NMSA 1978, § 72-5-1 (1953); NMAC § 19.26.2.10; NMAC §19.27.1.9.

As held by the district court, APR's application violates the statute in several respects. The application fails to designate "the beneficial use to which the water **will be applied**," "the place of the use for which the water **is desired**, and "the description of **the land to be irrigated** and name of the owner of [that] land."[14] NMSA 1978, §§ 72-12-3(A)(2), (6) & (7) (emphasis added); cf. Mathers v. Texaco, Inc., 77 N.M. 239, 248, 421 P.2d 771, 777-778 (1966) (upholding the validity of an application where "the applicant ... expressly specified the particular use for which the water is to be appropriated and the precise lands to which the same is to be applied to accomplish the purpose of such use."). APR failed to designate a "specific use" on its application. It also had to modify the state engineer's standard application form to accommodate thirty-seven wells and an

[14] APR did not commit to irrigating its own lands. [**RP 364** (email identifying ranch lands that may be irrigated, but only "to the extent that the applied-for water will be used for irrigation on Augustin Ranch")] No notice of these potential irrigated lands was provided. [**RP 86-102**]

"amended application."[15] These statutory violations required the state engineer and the district court to deny APR's application.

B. Section 72-12-3(B) does not allow the designation of multiple purposes and places of use on an application to appropriate underground water.

Although it ultimately did not save APR's application, the district court relied on Section 12-2A-5(A) (1997) of the Uniform Statute and Rule Construction Act ("the Act") to hold that an applicant can designate multiple purposes and places of use in its application. The district court erred in relying on the Act, because it applies only to statutes "enacted ... on or after [its] effective date," and even then it does not apply if "the context ... requires otherwise ...." NMSA 1978, § 12-2A-1(B).

First, Section 72-12-3 was enacted in 1931 and thus predates the Act by several decades. Second, in the context of prior appropriation, designating unlimited beneficial uses and seven counties as possible places of use, as APR did, stretches the rule of construction cited by the district court to absurdity. DeWitt v. Rent-A-Center, Inc., 2009 NMSC 32, 31, 146 N.M. 453, 212 P.3d 341 ("we must avoid [statutory] interpretations that would lead to absurd or unreasonable results."). If APR's approach were valid, then applicants could designate beneficial

[15] Although corrections are allowed in limited circumstances, neither the governing statutes nor the regulations provide for amendments to applications. § 19.27.1.11 NMAC; *cf.* NMSA 1978, § 72-5-3 (allowing retention of original priority if defective application corrected within sixty days).

use as "all of the above" and the place of use as "the State of New Mexico." As set out above, this notion is contrary to the prior appropriation doctrine and the governing statutes, which requires' applicants to manifest a present intent to appropriate water for a specific purpose and place of use. It is also contradicted by the state engineer's regulations, which expressly limit each underground permit to "the annual amount that can reasonably be expected to be produced and applied to beneficial use from a single well constructed at the point, in the manner, and for the purpose set forth in the application." NMAC § 19.27.1.10.

C. APR's vague and ambiguous application fails to expresses any specific intent to appropriate water, and therefore, effective public notice cannot be provided.

Under the common law, before enactment of state permitting statutes, every appropriation began with "the *bona fide* intent to appropriate" water and apply it to beneficial use. Millheiser at 106, 61 P. at 113-114; see also Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 416, 594 P.2d 566, 568 (S.Ct 1979) ("To initiate an appropriation" the applicant must first "have an intent to take the water and put it to beneficial use.") Although it may require years to accomplish in some cases, once a water right was perfected through diligent application of water to beneficial use, the elements of the water right (priority date, amount and place of use) all related back to and were defined by the appropriator's initial notice of intent. Miller at 107, 116-117, 61 P. at 114, 117-118; see also

Farmers Dev. Co. v. Rayado Land & Irrigation Co., 28 N.M. 357, 369 (1923); State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 470, 362 P.2d 998, 1001 (1961). Under the common law, the appropriator provided this notice by taking some "first step," consisting of "excavating ditches ... or any substantial act ... giving notice of" the contemplated appropriation. Farmers, 28 N.M. at 369.

The adoption of New Mexico's Constitution and permitting statutes did not change the common law of prior appropriation, because both enactments "are merely declaratory of [the] existing law." Yeo v. Tweedy, 34 N.M. 611, 614, 286 P. 970, 972 (1929). Statutes that are "declaratory of common law fully established in this jurisdiction" do not "take away the common law in relation to the same matter." State v. Trujillo, 33 N.M. 370, 376, 66 P. 922, 925 (1928) (internal quote omitted). The Supreme Court relied on this principle in Yeo to hold that prior appropriation applied to underground water even though our Constitution and statutes (at that time) appeared limited to surface water. Yeo at 614, 286 P. at 972.

Notice of appropriation is still required in New Mexico but is now provided by the filing and publication of an application. NMSA 1978, § 72-12-3 (2006); see Sowards v. Meagher, 108 P. 1112, 1117 (Utah 1910) (the "filing of a written application with the state engineer, as required by the statute, is but ... giving of a notice of ... an intention to appropriate unappropriated public water"). Notice of an application is published "upon the filing," NMSA 1978, § 72-12-3 (D), and upon

state engineer approval, the application becomes a permit to appropriate "the state's water" in accordance with the terms of the permit. Hanson ¶9; NMSA 1978, § 72-5-6.

Meaningful notice of an application that, like APR's, discloses no specific intent to appropriate water is impossible to provide. Objectors to such vague applications cannot determine whether they meet statutory standing criteria, because they cannot tell whether or how they "will be substantially and specifically affected by the granting of the application." NMSA 1978, § 72-12-3(D). The statute requires notice in "each county where the water will be or has been put to beneficial use," id., but APR's application designates seven counties where water **might** be used. As the district court pointed out, APR's unclear intentions may explain the absurdly large number of objectors—over 900. [**RP 889-890**] On the other hand, others likely failed to object because they could not determine from the public notice exactly what APR has in mind.[16] This vagueness violates the statutory application and notice requirements. Id.; see also Eldorado at Santa Fe, Inc. v. Cook, 113 N.M. 33, 36, 822 P.2d 672 (Ct. App. 1991) (violation of statutory notice procedures violates due process).

[16] Protestants have standing to "vindicat[e] the general public's right to participate in the permitting process in addition to their own right to proper statutory notice." See Martinez v. Maggiore (In re Northeastern N.M. Reg'l Landfill), 2003 NMCA 43, 133 N.M. 472, 64 P.3d 499.

D. APR's vague and ambiguous application precludes the state engineer from performing his statutory duties and violates the statutory due process rights of Protestants.

APR's unclear intentions prevent the state engineer and Protestants from analyzing the impacts of APR's application and preparing for hearing. For example, among the virtually unlimited possibilities, APR's application would allow it to export all or some portion of the 54,000 afy to Santa Fe, use all or some for projects on APR's ranch, or pipe all or some to the Rio Grande for use in Texas. Each of these options has substantially different implications in terms of the relevant statutory criteria—impairment of existing water rights, conservation of water, and public welfare. NMSA 1978, §§ 72-12-3(D) & (E). Each potential option requires substantially different argument, evidence and expertise to support or oppose. The fact that the state engineer and Protestants have to guess at APR's intentions precludes the state engineer from performing his statutory duties and deprives Protestants' of their statutory right to meaningful notice and the opportunity to appear and present argument and evidence.[17] NMSA 1978, § 72-2-17(B)(1).

In summary, APR's vague application violates the principles of beneficial use and prior appropriation. As described above, the fundamental aim of these doctrines is "definiteness and certainty." Las Vegas ¶ 34. Consistent with this aim,

[17] The availability of discovery does not help if APR has no duty to disclose its intentions to appropriate water until the hearing or later, as argued by APR.

the purpose of the statutory "application and permit" system is to "limit the nature and extent of the water right." NMAC § 19.27.1.10 NMAC. APR's application stands in direct opposition to these fundamental principles. The intentions expressed in the application are uncertain, indefinite, and without any meaningful limits. Contrary to the New Mexico Constitution and governing statutes, the amount of water requested by APR is not based on, limited to, or measured by any particular beneficial use. N.M. Const. Art. XVI, § 3. Indeed, APR admits that the amount requested is based on how much the aquifer can allegedly produce for "300 years," not beneficial use. [**RP 133**] This violates the prior appropriation doctrine, deprives the public of lawful notice and a meaningful opportunity to defend their interests, and prevents the state engineer from performing his statutory duties.

CONCLUSION

For the foregoing reasons, Protestants respectfully request this Court to uphold the district court's decision denying APR's application on summary judgment.

REQUEST FOR ORAL ARGUMENT

This case involves complex and esoteric issues of water law and due process. Oral argument may assist the Court in resolving these issues.

Respectfully submitted:

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CERTIFICATE OF SERVICE: I certify that I mailed a copy of the foregoing paper on the 9/13/13 to the following parties' attorneys:

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ANSWER BRIEF SIGNATURE PAGE