

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v.

No. 32,705

SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.

ANSWER BRIEF OF APPELLEE NEW MEXICO STATE ENGINEER

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
CATRON COUNTY, STATE OF NEW MEXICO
MATTHEW G. REYNOLDS, DISTRICT JUDGE

Pursuant to Rule 214(B)(1) NMRA, the State Engineer respectfully requests oral argument to allow for elaboration on the application review process.

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Statement of Compliance with Rule 12-213(F) NMRA

The undersigned counsel certifies that the body of this Answer Brief has a total of 8,705 words, is in 14-point Times New Roman font, is proportionately spaced, and complies with Rule 12-213(F) NMRA. The brief was created using MS Word 2007, which was used to obtain the above word count.

Recordation of Proceedings and Citation to the Record

When citing to the Record Proper, counsel for Appellee uses the numbers assigned by the clerk of the trial court in preparing the record for transmission to the Court of Appeals and designates those citations as "RP."

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

Appellant Augustin Plains Ranch, LLC (APR) has narrowly framed its issue on appeal: whether the district court erred in upholding the State Engineer's denial of the Application without holding an evidentiary hearing on the merits of the Application. **[BIC 1]**. The answer is "no."

APR submitted an application for a new appropriation of 54,000 acre-feet per year of groundwater (Application) to the State Engineer. **[1 RP 68-84]**. All applications to appropriate groundwater must include the information necessary to define the elements of the water right proposed to be developed if a permit is issued. 19.27.1.10 NMAC. APR submitted incomplete information for several portions of its Application, including the specific purposes of use of the applied-for water right. **[1 RP 68]**. Existing water right owners could not determine from the Application whether APR's appropriation of groundwater, if permitted, would impair their existing rights. **[1 RP 258-260]**. Other persons could not frame protests that would meet the standing requirements to object to the Application. For this reason, over 900 persons (Protestants) filed objections to the Application, arguing that it was facially invalid. **[1 RP 65, 165, 2 RP 337-355, 367-372, 427, 454-455]**. Water right owners must be specific in their protests, whether based on an impairment, public welfare, or conservation of water analysis, and therefore all

applications must be specific enough for a protest to meet that high standard. *See* NMSA 1978, § 72-12-3(D) (2001). If there are no protests, then an application must be specific enough for the State Engineer to act. *See* NMSA 1978, § 72-12-3(E) (2001); 19.27.1.10 NMAC. As pointed out below, the Water Rights Division (WRD) asked for additional information before accepting the Application, but the district court found that the amended Application still lacked sufficient information to be accepted by WRD and that the State Engineer had no choice but to deny it. **[3 RP 885]**.

APR asserts that the State Engineer is bound by WRD's acceptance of the Application and that he could not later determine that the Application was facially inadequate. **[BIC 31]**. There is no basis in law to support this proposition. After the parties briefed the issue, the State Engineer held a hearing for oral argument on Protestants' Motions to Dismiss (Motions) for failing to meet the requirements of specificity. **[3 RP 647]**. The State Engineer granted the Motions and denied the Application after having considered the pleadings, the record, and oral argument made at hearing, concluding that the Application did not meet the fundamental statutory requirements for filing. **[3 RP 659-662]**. The State Engineer's post-hearing decision to deny the Application remedied WRD's improvident acceptance of the facially invalid Application.

Upon de novo review, the district court upheld the State Engineer's denial. **[3 RP 882]**. The district court found the Application to be insufficient for filing, and that the State Engineer properly denied it after reviewing it in light of the Protestants' Motions. **[3 RP 903]**. The State Engineer, as the district court held, correctly denied the Application as a matter of law because it was not sufficiently specific to allow for protests to be filed that met the specificity requirements of Section 72-12-3(D) or to provide for a full analysis by the State Engineer in the event no protests were filed. **[3 RP 889-890]**. In fact, the district court held that the issue raised by Protestants' Motions required the State Engineer to deny it, as authorized by NMSA 1978, Section 72-12-3(F) (2001), and that he fully complied with the statutory scheme in his denial of the Application. **[3 RP 884, 891]**.

In this appeal, APR erroneously claims that the statutory scheme governing the Application required the State Engineer to conduct an "evidentiary" hearing in order to act on it. APR's Brief in Chief lacks any legal citation or support for its contention that the district court erred in holding (i) that the oral argument hearing on the Protestants' Motions to Dismiss did not satisfy the hearing requirement of Section 72-2-16 and (ii) that APR was not entitled to an evidentiary hearing before the State Engineer review. Neither Section 72-12-3 nor Section 72-2-16 requires the State Engineer to provide applicants an evidentiary hearing. Accordingly, the district court's decision was correct and should be upheld.

II. STATEMENT OF FACTS

APR's recitation of the procedural history of the case is sufficiently accurate for purposes of this Court's review. However, the State Engineer notes that the facts stated by APR support the district court's decision and affirmance by this Court. APR admits that its Application was so lacking in specificity that an evidentiary hearing was required to present the details of APR's intended purposes of use. [BIC 1, 4].

ARGUMENT

III. STANDARD OF REVIEW

This case presents an issue of statutory construction, which is an issue of law that this Court reviews de novo. *Oldham v. Oldham*, 2011-NMSC-007, ¶ 10, 149 N.M. 215, 218 (citation omitted).

IV. INTRODUCTION

This is a simple case concerning the extent of the information that must be included in an application for a new appropriation of water to be sufficiently complete to be accepted for filing by the WRD. The statutory scheme is clear and concise. NMSA 1978, Section 72-12-3(A) (2001) requires an applicant to designate: i) the source of water to be appropriated; ii) the beneficial purpose of use to which the water will be applied; iii) the location of the well (point of diversion); iv) the amount of water applied for to be placed to beneficial use; v) the place of use; and vi) if for irrigation purposes of use, the description of the land to

be irrigated. These are the six descriptive elements which define the limits on a proposed appropriation. If water is placed to beneficial use for one of the designated purposes, then they become the elements of the established water right.

It is essential that the application be complete. The six descriptive elements for each proposed purpose of use are necessary for the State Engineer's action on the application if no objections are filed or, if there are objections, his ability to determine whether to first hold a hearing and then act or act without holding one. These elements must be set forth with specificity, not only for the State Engineer to decide on a course of action, but also so that potential protestants can decide whether to file objections.

Section 72-12-3(D) provides that any person has standing to object if claiming that his or her water right will be impaired. Obviously, the location of the well and the amount of water for each proposed purpose of use are critical to an impairment analysis. Additionally, a person can have standing to object if he or she can show that he or she will be specifically and substantially affected by the granting of the application because it will be detrimental to the public welfare and contrary to the conservation of water within the State. Critical to a person's standing is the ability to ascertain from an application the information necessary to protest on the grounds of impairment, public welfare or conservation of water.

If incomplete applications are accepted for filing it creates an unacceptable situation, as in this case. Here, WRD accepted the Application, which is so general that it is not possible to ascertain the amounts of water and points of diversion associated with any specific purpose or place of use. An application this vague makes it impossible for protestants to meet the standing requirements and for the State Engineer to act on the application as submitted.

The Protestants moved to have the Application dismissed on this basis. The State Engineer held a hearing, granted the Motions, and denied the Application without prejudice so that APR could refile a completed application. Rather than following the simple path of refiling, APR instead appealed the State Engineer's denial of the Application, which APR could do under Section 72-2-16 only because the State Engineer had held a hearing.

Therefore, APR's position that it was entitled to an evidentiary hearing before the State Engineer is without merit. Under APR's theory the State Engineer would not be able to act without a hearing, as Sections 72-12-3(E) and (F) and 72-2-16 authorize him to do. APR's theory is even more problematic for Protestants. Under the State Engineer's hearing rules at 19.25.2 NMAC (03/11/1983, as amended 08/30/2013), a protestant's standing may be challenged at any point. In this case, the standing of all 900 Protestants would be subject to challenge by APR

or WRD because the Application was not complete enough for them to meet the statutory standing requirements for filing protests under Section 72-12-3(D).

It is patently unfair to the public and contrary to statute for WRD to accept an incomplete application for filing. The suggestion that all short comings of the Application could be cured later at an evidentiary hearing implies that parts of Sections 72-13-3(D), (E) and (F) are without meaning. The district court is correct that the statutory process requires that applications must be sufficiently detailed to allow the State Engineer to act without hearing and for Protestants to meet the requirements for standing. The district court should be affirmed for the reasons that follow.

V. THE DISTRICT COURT CORRECTLY UPHELD THE STATE ENGINEER'S DENIAL OF THE APPLICATION

A. No Law Mandates That An Evidentiary Hearing Be Held for Every Application

Throughout its brief, APR repeatedly states that the review process for water rights applications includes “an evidentiary hearing mandated by statute” and that “[t]he right to an evidentiary hearing is an essential procedural protection in proceedings before the State Engineer.” [BIC 10, 14]. Each time APR makes these statements, it is without any authority on point, *see, e.g.* [BIC 10, 11, 13, 14].

APR cites Section 72-12-3(F), but this section merely provides that the State Engineer has the option of either holding a hearing or denying an application

without holding one and it does not reference an “evidentiary” hearing. [BIC 22]. Nor do any of the other statutes that APR discusses provide support for its position.

APR also argues that in *Lion’s Gate* “[o]ur Supreme Court has recognized that the State Engineer must consider the full merits of any application, subject to a single statutorily mandated exception when an initial determination is made that no unappropriated water is available to an application seeking to appropriate surface water.” [BIC 11]. While true that the Supreme Court cautioned against piecemeal litigation, it also held in that case that the validity of water rights in a transfer application is an appropriate threshold issue. APR fails to explain or provide authority that the facial validity of an application is a similar threshold issue to be decided before addressing the merits. No other statute or case mandates that an evidentiary hearing be held on every application.

B. Section 72-12-3(F) Authorizes the Statutory Procedure that the State Engineer Followed in this Case

Section 72-12-3 governs the filing and review of the Application in this case, and the parties agree that WRD accepted the Application under Section 72-12-3(C). [BIC 31]. After the Application was accepted, WRD caused notice to be published in accordance with Section 72-12-3(D). [1 RP 86-102, 140-46].

Numerous protests were then filed [1 RP 65, 104-124], and the State Engineer was required to act on the Application in accordance with Section 72-12-3(F). Subsection (F) allows the State Engineer to either deny an application

without a hearing or to hold a hearing before he acts. Rather than act without a hearing, APR's Application was referred to the State Engineer's Hearing Unit. [1 RP 65]. The hearing examiner docketed the Application for hearing and issued a scheduling order with a statement of issues that reflected the statutory standards in Section 72-12-3(E) and included a provision for dispositive motions. [1 RP 306-310]. Many of the Protestants then moved to dismiss the Application, asserting that it was invalid on its face because it violated New Mexico law governing the filing of applications to appropriate groundwater. [2 RP 337-355, 367-372, 427, 454-455]. The hearing examiner scheduled a hearing on the Motions to Dismiss and limited the issue to the facial invalidity argument. [3 RP 647]. The parties had fully briefed the Motions [2 RP 521-557] and participated in that hearing, after which the State Engineer issued an order denying the Application. [3 RP 659]. Each step in this process conforms to the procedure set out in Section 72-12-3(F) and to the rules and statutes governing hearings conducted before the State Engineer. 19.25.2 NMAC (03/11/1983, as amended 08/30/2013), § 72-2-16 and NMSA 1978, Section 72-2-17 (1965).

Under Section 72-12-3(F), the State Engineer is not required to hold any type of hearing before denying an application; rather, the statute gives him discretion to do so if protests have been filed. This is the only hearing to which the statute refers. In addition, the statute is silent on the scope or type of hearing that

is required if the State Engineer chooses to hold one. § 72-12-3(F). It does not require that the hearing be an evidentiary one or that it provide an applicant the opportunity to flesh out or further develop an application. In conducting these hearings, the State Engineer follows a hearing process akin to that of the district courts that may, depending on a particular application, include discovery, motion practice, sanctions and, if necessary, an evidentiary hearing. *See* 19.25.2 NMAC (03/11/1983, as amended 08/30/2013).

Despite the clear language of Section 72-12-3(F), APR argues that it was entitled to an evidentiary hearing. *See, e.g., [BIC 23]*. This argument cannot be reconciled with the State Engineer's right to deny an application based upon a finding of insufficiency under Section 72-12-3(E) or his right to deny a permit under Section 72-12-3(F). Contrary to the plain language of these subsections, APR suggests that they nevertheless afford an applicant an opportunity to develop the elements of an application at an evidentiary hearing. *Id.* Such an interpretation would completely undermine the State Engineer's authority to decide whether to issue a permit based solely on the information provided in an application.

19.27.1.14 NMAC.

The State Engineer could not make an informed determination here due to the Application's deficiencies. Accordingly, upon Protestants' Motions, he was compelled to deny the Application as facially invalid. A detailed application is

essential to any person so that he or she has the necessary information to protest either on grounds of impairment to his or her water right or on grounds of public welfare or conservation. *See* § 72-2-3(D) .

APR asks the Court to construe Section 72-12-3 to mean that upon WRD's acceptance of its Application and required publication of notice of the Application, the State Engineer was required to hold an evidentiary hearing. **[BIC 21-22]**. Under APR's theory, every applicant is entitled to an evidentiary hearing. If that were true, which it is not, it would require the State Engineer to hold evidentiary hearings for applications that are contrary to law and for which he has no jurisdiction to issue a permit. APR cites no provision of Section 72-12-3 or any case that supports its contention that once an application has been accepted, an applicant is entitled to an evidentiary hearing. *See, e.g., [BIC 21]* (“[a]fter notice is published, the State Engineer must consider the application on the merits”); **[BIC 32]** (after publication of notice, APR “timely notified the State Engineer that it was invoking its right to an evidentiary hearing.”)

The district court correctly decided that the State Engineer acted in accordance with the plain language of the statute when he denied the Application after holding a hearing on the Motions. There is no need for the Court to interpret the statutory language of Section 72-12-3(F), since it is clear. *Derringer v. Turney*, 2001-NMCA-075, ¶ 8, 131 N.M. 40, 44 (“[I]f the meaning of a statute is truly

clear, it is the responsibility of the judiciary to apply it as written and not second guess the legislature's policy choices.") (internal quotations and citations omitted).

C. Section 72-2-16 Requires Only That The State Engineer Hold a Hearing Prior to Appeal

APR relies heavily on construing Section 72-2-16 with Section 72-2-17 to require an evidentiary hearing on its Application. **[BIC 15]**. The argument is not supported by law. Section 72-2-16 can be read consistently not only with Section 72-2-17, but also with Sections 72-12-3 and NMSA 1978, Section 72-5-5 (1985). In none of those circumstances does such a reading unequivocally provide for an evidentiary hearing.

Section 72-2-16 contains several important provisions: i) the State Engineer can order a hearing before he acts; ii) he can act without holding a hearing; iii) if he acts without holding a hearing, any person that is aggrieved is entitled to a hearing if timely requested; iv) hearings shall be conducted before the State Engineer or his hearing officer; v) a record shall be made of all hearings; and vi) a hearing is required before appeal.

Applying Section 72-2-16 to APR's Application demonstrates that APR was not entitled to a hearing other than the one it received. The State Engineer, through his Hearing Examiner, ordered a hearing on the Application as provided at Section 72-12-3(F). Under both Section 72-12-3(F) and Section 72-2-16, APR was only entitled to one hearing before the State Engineer, which it received. *See* § 72-2-16

(“If, without holding a hearing, the state engineer enters a decision . . . any person aggrieved . . . is entitled to a hearing,” and “No appeal shall be taken to the district court until the state engineer has held a hearing and entered his decision in the hearing.”) (emphasis added). Neither Section 72-12-3 nor Section 72-2-16 explicitly or implicitly suggest that the only hearing satisfying the requirement for appeal is an “evidentiary” one. APR participated fully in the hearing that was held pursuant to Section 72-12-3 and it was not entitled to an additional one.

APR cites Section 72-2-16 and 19.25.4.8 NMAC to argue that it was denied its right to a hearing, while highlighting the language stating that a hearing shall be held “upon written request by any person aggrieved by any action or refusal to act by the state engineer.” **[BIC 15]**. Both Section 72-2-16 and 19.25.4.8 NMAC address an applicant’s right to require a hearing if aggrieved by a pre-hearing decision. Significantly, in APR’s case there was no pre-hearing decision. Without a pre-hearing decision, APR could not be aggrieved. If APR was not aggrieved, it had no basis to request a hearing. Since there was no pre-hearing decision and the Application was protested, WRD referred APR’s Application to the Administrative Litigation Unit for a pre-decision hearing. **[1 RP 65]**. After APR received its hearing, APR’s only remaining option was to file an appeal. There was no option to request a post-hearing decision hearing because APR was not entitled to two

hearings before the State Engineer. For this reason, neither Section 72-2-16 nor 19.25.4.8 NMAC support APR's contention.

APR argues that *Derringer* requires the State Engineer to provide it with an evidentiary hearing. In *Derringer v. Turney*, the State Engineer issued a pre-hearing decision. 2001-NMCA-075, ¶ 12, 131 N.M. at 45. In this case, the State Engineer issued a post-hearing decision. Derringer could request an aggrievement hearing because he did not have a hearing prior to the State Engineer's decision. *Id.* ("Section 72-2-16 creates a statutory right to a hearing only if two pre-conditions are satisfied: (1) a party must be aggrieved, and (2) the state engineer must have entered an adverse decision without a prior hearing.") Thus, *Derringer* does not support APR's argument that Section 72-2-16 required a hearing because the State Engineer did not issue a pre-hearing decision on APR's Application. Unlike *Derringer*, the only portion of Section 72-2-16 that applies to APR's situation is the requirement that the State Engineer have held a hearing as a prerequisite to APR filing an appeal in district court. APR had its hearing, which allowed APR to appeal the State Engineer decision to the district court.

In *Lion's Gate Water v. D'Antonio* our Supreme Court addressed an argument analogous to APR's and concluded that Section 72-2-16 guarantees an applicant a hearing only in specific instances. 2009-NMSC-057, 147 N.M. 523. While APR relies on *Lion's Gate* to support its argument, the case actually

supports the State Engineer's position. *Lion's Gate* involved an application to appropriate water from the Gila River, which applications are governed by the surface water code, and not the groundwater code as in this case. WRD summarily rejected the initial application, as well as multiple amended applications, based on its finding that there was no unappropriated water available pursuant to NMSA 1978, Section 72-5-7 (1985). *Id.* ¶ 25, 147 N.M. at 533. The Supreme Court held that "[i]f the State Engineer makes a pre-hearing determination that water is unavailable for appropriation, secondary issues that must otherwise be considered before a permit to appropriate water can be granted become irrelevant, because the State Engineer is required to reject the application without reaching those issues." *Id.* ¶ 26, 147 N.M. at 533 (emphasis added).

Lion's Gate, having been aggrieved by a State Engineer decision, then requested a hearing under Section 72-2-16. *Id.* ¶ 28, 147 N.M. at 533-34. This is the same situation that arose in *Derringer*. Both *Derringer* and *Lion's Gate* were entitled to aggrieval hearings based on pre-hearing decisions. APR's argument that it requested a hearing under Section 72-2-16 is irrelevant because there was no State Engineer decision to aggrieve. *See Derringer*, 2001-NMCA-075, 131 N.M. 40 (addressing statutes requiring pre-hearing decision, aggrieval by decision, and timely request for hearing).

Under either statutory scheme, both Lion's Gate and APR were only entitled to one hearing on their respective applications, and in neither case did the applicable statute require that hearing to be an evidentiary one. The State Engineer properly rejected Lion's Gate's application upon a preliminary finding of no unavailable surface water pursuant to Section 72-5-7, and Lion's Gate requested and received a post-decision hearing on that issue under Section 72-2-16. The State Engineer similarly properly denied APR's application upon a finding that the Application was facially invalid under Section 72-12-3(F). Unlike Lion's Gate, however, APR received a pre-decision hearing, which precluded APR from also having a hearing under that part of Section 72-2-16 applying to aggrievals from pre-hearing decisions. Both applicants received hearings on threshold issues,¹ but neither was entitled to have the State Engineer hold a hearing on any issue beyond those initial findings.

The Supreme Court read Section 72-5-7 harmoniously with Section 72-2-16 to permit disposal of an application upon a preliminary determination without a hearing that there is no water to appropriate. *Lion's Gate*, 2009-NMSC-057, ¶26, 147 N.M. at 533. By analogy, Section 72-12-3 must be read harmoniously with Section 72-2-16 to result in the same outcome, permitting disposal of a case

¹ See *Headen v. D'Antonio*, 2011-NMCA-058, ¶ 9, 149 N.M. 667, 670, in which this Court held that "we see no significant difference between the subject of the threshold issue of water availability in *Lion's Gate* and the issue of forfeiting a water right" in Headen's application proceeding before the State Engineer.

without a hearing, although based on different threshold findings in this case and in *Lion's Gate*. The two reconciled provisions dispose of APR's argument that after the State Engineer provided a pre-decision hearing, he was required to provide APR with a post-hearing decision hearing under Section 72-2-16. This is obviously not required by either statute.

D. Section 72-2-17 Did Not Require the State Engineer to Hold an Evidentiary Hearing in this Case

APR misinterprets Section 72-2-17. [**BIC 16-17**]. That section merely provides for hearings generally, including one on the merits if an application proceeds to an evidentiary hearing. Indeed, Section 72-2-17 applies to all hearings before the State Engineer, as it applied to the one held in this case.

The Supreme Court has held that the Office of the State Engineer was established as an "administrative agency to efficiently handle the complex and esoteric process of water rights applications." *Lion's Gate Water*, 2009-NMSC-057, ¶ 31, 147 N.M. at 535. The complex nature of water law, coupled with its attendant hydrologic component, requires the State Engineer to function in a quasi-judicial capacity. The statutes governing the application process draw from the Rules of Civil Procedure and complement the State Engineer's regulations.

19.25.2.16 NMAC. For instance, motion practice and discovery are permitted in the course of administrative proceedings. 19.25.2.10 NMAC. Additionally, a hearing examiner may enter scheduling orders establishing discovery deadlines.

19.25.2.15 NMAC, 19.25.2.17 NMAC. A hearing examiner may determine the scope of the hearing and the issues to be addressed, as the Hearing Examiner did in this case. 19.25.4.11 NMAC (“The state engineer may limit the issues to be tried before an examiner in any particular case by written order.”) Whenever a hearing is to be held, the State Engineer follows the general administrative processes provided for in NMSA 1978, Section 72-5-6 (1985), in Sections 72-12-3 and 72-2-16 through -17, and the administrative process specifically set forth at 19.25.2 NMAC (03/11/1983, as amended 08/30/2013)..

Significantly, the hearing APR had before the State Engineer concerning whether the Application was facially valid was substantively the same as the one that would have been held if WRD had not accepted the Application or if the State Engineer had denied the Application without a hearing under Section 72-12-3(F). If these were the procedural facts of this case, APR could have requested a hearing pursuant to Section 72-2-16 on the basis that it had been aggrieved. However, the only issue for the aggrievement hearing still would have been whether the Application was facially valid, and the State Engineer could properly have limited the 72-2-16 hearing to that issue. 19.25.2.15(A) NMAC. Thus, the Application would not have proceeded to an evidentiary hearing under Section 72-2-17 unless and until APR demonstrated that the Application was facially valid.

E. Section 72-12-3(E) Does Not Require the State Engineer to Hold Any Hearing and It Is Inapplicable to this Case

It appears that APR argues that it was entitled to an evidentiary hearing so the State Engineer would have the information necessary to analyze the items listed in Section 72-12-3(E) and render a decision. **[BIC 21]**. This argument is without merit because Section 72-12-3(E) requires the State Engineer to analyze the three elements described in the statute only when no objections have been filed and the State Engineer reviews an application under that subsection. Accordingly, Section 72-12-3(E) does not apply to the Application at issue in this case.

APR argues, as it argued to the district court, that in granting the Protestants' Motions to Dismiss, the State Engineer impermissibly failed to determine "whether unappropriated water was available, whether the proposed appropriation would impair existing rights, whether it would be contrary to the conservation of water, or whether it would be detrimental to the public welfare." **[BIC 4-5]**.² While this argument correctly recognizes the elements that the State Engineer must consider for unprotested applications, Section 72-12-3(F) does not list those elements. Instead, Subsection (F) defers to the State Engineer's expertise in determining whether to approve an application when objections have been filed.

² This appeal of the district court's decision does not question the State Engineer's decision, but questions whether the district court properly affirmed the State Engineer. **[BIC 1]**.

The State Engineer's discretion to consider all matters relevant to an application under Section 72-12-3(F), in addition to those found in Section 72-12-3(E), allows him to consider issues of unappropriated water, validity of water rights, and legality of the application. However, only if these issues are not raised or are resolved in an applicant's favor does the State Engineer reach the Subsection (E) issues. In all cases, he may only grant a permit if his analysis indicates that there is no basis for denial. Subsection (F), unlike Subsection (E), allows the State Engineer to undertake a more detailed analysis of the effect of approving an application. Although the State Engineer may include the factors set out in Subsection (E) in reviewing applications when protests have been filed, there is no statutory requirement that he is limited to those issues listed under Section 72-12-3(F). If the Legislature intended to limit his discretion, then it would have added the same provisions of Subsection (E) to Subsection (F). Instead of limiting the scope of review, the Legislature granted the State Engineer broad authority that allows him to deny an application if "in his opinion" it should not be approved.

Section 72-12-3(E) is not relevant to the Application at issue and, in any event, it does not require the State Engineer to hold a hearing for applications reviewed under that provision.

VI. OUR COURTS HAVE UPHELD STATE ENGINEER HEARINGS LIMITED TO SINGLE DISPOSITIVE ISSUES RAISED BY MOTION

APR mistakenly cites *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 147 N.M. 523, in support of its argument that the State Engineer's preliminary review of the sufficiency of an application is an impermissible "partitioning" of issues for litigation. [BIC 11]. While *Lion's Gate* "acknowledge[d] the potential problem if every issue relevant to a water rights application could be partitioned" and litigated, the Supreme Court did not conclude that any partitioning occurred in that case. *Id.* ¶ 31, 147 N.M. at 535. Rather, the Supreme Court held that the State Engineer's rejection of the application in that case was correct because, under Section 72-5-7, the State Engineer is required to reject an application if, in his opinion, there is no unappropriated water available. *Id.* Finding that there was none, he could not consider any other issues. *Id.* ¶¶ 26-27, 147 N.M. at 533.

APR's conclusion that "the Supreme Court has recognized that, with the sole exception of the initial determination of whether unappropriated water is available, the State Engineer 'must consider the full merits' of the application" is an incorrect statement of law. [BIC 20]. The Supreme Court reached its conclusion in *Lion's Gate* in the context of the very specific language of the surface water code, which differs in pertinent part from the groundwater code. Thus, APR's argument that the State Engineer "did exactly what the Supreme Court in *Lion's Gate Water*

cautioned him not to do” is without merit. **[BIC 11]**. As discussed below, the *Lion’s Gate* decision actually supports the State Engineer’s position in this case, and not APR’s position.

Our courts have consistently approved of the Legislature’s grant of authority to the State Engineer to deny or reject a water rights application without a hearing as a result of a preliminary determination that precludes review of the merits of an application. As discussed below, these cases represent initial hurdles similar to a finding of facial invalidity, which an applicant must surmount in order for the State Engineer to consider the merits of an application.

In *Lion’s Gate Water*, the Supreme Court held that the State Engineer was required to reject a permit application for surface water without a hearing upon a finding that there was no water available to appropriate:

The Legislature, in creating an efficient and effective administrative process for water rights applications, recognized the dispositive nature of this threshold issue when it crafted New Mexico’s water code and mandated in Section 72-5-7 that the State Engineer ‘shall’ summarily reject water rights applications upon a determination that water is unavailable for appropriation.

2009-NMSC-057, ¶ 25, 147 N.M. at 533. The Supreme Court held that if the State Engineer makes a pre-hearing determination that no water is available for appropriation, then “secondary issues that must otherwise be considered before a permit to appropriate water can be granted become irrelevant, because the State

Engineer is required to reject the application without reaching those issues.” *Id.* The effect of the preliminary determination “is to limit the State Engineer’s adjudicative jurisdiction over the application.” *Id.* ¶ 26, 147 N.M. at 533. Thus, the statute at issue in *Lion’s Gate* permits rejection of an application without a hearing upon a determination that no water is available as a matter of law. Whether an application otherwise satisfies public welfare, conservation or any other criteria is irrelevant.

In this case, a determination that the legal requirements for a completed application have not been satisfied has a similar effect as a determination that no water is available to appropriate: the State Engineer cannot reach any secondary issues without first making that preliminary determination. Like *Lion’s Gate*, the statute at issue in this case demands the result reached by the State Engineer as a matter of law, as the district court held on *de novo* review. The only difference in this case is that, instead of turning on the availability of water, the threshold issue is whether the application is complete.

In *Headen v. D’Antonio*, this Court held that the State Engineer could reject an application without a hearing upon a finding that there were no valid water rights to transfer because they had been forfeited. 2011-NMCA-058, ¶ 2, 149 N.M. 667, 669. The State Engineer rejected by letter an application to transfer 82.83 acre-feet of water rights, following a threshold determination that the

applicant possessed no valid water rights to transfer. This Court found the State Engineer's rejection appropriate because it saw "no significant difference between the subject of the threshold issue of water availability in *Lion's Gate* and the issue of forfeiting a water right in the present one." *Id.* ¶ 9, 149 N.M. at 670. The statutes here expressly authorize the State Engineer to act on an incomplete application without a hearing, either by refusing to accept one that does not satisfy Section 72-12-3(A) and (C) or by later determining that an application is facially invalid and should therefore be denied under Section 72-12-3(F).

In both *Lion's Gate* and *Headen*, the State Engineer could summarily dispose of the applications by making preliminary threshold determinations. The State Engineer can, and in the case of *Lion's Gate* did, hold a hearing on a single issue and thereafter acted on the application in accordance with the relevant statute. The applications in both *Lion's Gate* and *Headen*, if accepted by WRD, could later have been disposed of on the issues of availability of unappropriated water or forfeited water rights without having a hearing on the merits. Similarly, the district court here held that the State Engineer could deny the Application upon a preliminary finding that it failed to conform to the statutory requirements. **[3 RP 884]**. In each of these instances, not only is the State Engineer statutorily authorized to act on applications without a hearing, but in fact he is required to do

so as a matter of law. To bypass those statutory threshold inquiries would violate his statutory duties, and APR has not cited any legal authority to the contrary.

VII. THE LEGISLATURE GRANTED THE STATE ENGINEER AUTHORITY TO EXERCISE HIS INDEPENDENT JUDGMENT WHEN HE DISAGREES WITH THE ACTIONS OF THE WATER RIGHTS DIVISION

It would violate the State Engineer's statutory duties to manage the waters of the State and make meaningless his expertise in the area of water if the statutes required him to rubber stamp every action of his staff.³ *See State ex rel. Reynolds v. Aamodt*, 1990-NMSC-099, ¶ 8, 111 N.M. 4, 5 (finding that "[t]he legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him"); *see also Eldorado Utils., Inc. v. State ex rel. D'Antonio*, 2005-NMCA-041, 137 N.M. 268 (recognizing the State Engineer's discretion to decide the proper course of a filing by refusing to accept a declaration because water rights were not vested.) The State Engineer has been vested with broad authority to exercise his professional opinion. *See Hanson v. Turney*, 2004-NMCA-069, 136 N.M. 1 (there is no estoppels against the State Engineer where it would require him to repeat previous errors); *Headen v. D'Antonio*, 2011-NMCA-

³ In *ABCWUA v. State Engineer*, 2013-NMCA-__ (No. 31,861, Aug. 7, 2013), petition for cert. filed Sept. 6, 2013, this Court essentially held that the State Engineer was stopped by WRD's water right validity determination despite having to view its conclusion for the first time after hearing and reaching a different conclusion. In doing so, the Court confused the role of WRD as being separate and distinct from that of the State Engineer in the hearing process.

058, 149 N.M. 667 (State Engineer can determine validity of water rights); *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 147 N.M. 523 (State Engineer can determine availability of unappropriated water); *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039 (State Engineer can determine elements of water rights). Here, WRD allowed APR to submit an incomplete Application. WRD's acceptance, however, does not alter the State Engineer's expertise or his statutory duties to independently review an application or to deny one. Just as in *Turney*, the State Engineer should not be estopped from considering whether the Application was sufficiently complete solely on the basis of WRD's acceptance.

A. The District Court Correctly Held That APR's Application Lacked Sufficient Specificity to Be Accepted by WRD

APR argues that WRD's acceptance of the Application in the first instance "reflects a determination that it provides all of the information required by Section 72-12-3 inasmuch as the State Engineer is prohibited by statute from accepting an application that fails to provide the required information." [BIC 31-32]. The State Engineer disagrees that WRD's acceptance equates to the State Engineer's determination that an application is complete. Both the State Engineer and district court correctly determined that WRD should not have accepted APR's Application as filed because it did not satisfy the legal requirements.

Prior to acceptance by the State Engineer, “applications tendered must conform to the requirements of the statutes and rules and regulations of the state engineer.” 19.27.1.11 NMAC. This is because an application and permit to appropriate groundwater limit the “nature and extent of the water right.”

19.27.1.10 NMAC. To that end, Section 72-12-3(A) requires that an application to appropriate groundwater “designate” the proposed elements of the water right to be included in the permit if the State Engineer grants the application. These elements include, *inter alia*, “the beneficial use to which the water will be applied;” “the place of use for which water is desired; and if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land.” §§ 72-12-3(A) (2), -3(A)(6) and -3(A)(7). The elements for each designated purpose of use must be set forth so that WRD, if the Application is unprotested, and the State Engineer, if the Application is protested, can evaluate the Application as submitted and determine whether it must be modified. 19.27.1.10 NMAC.

Applications that do not satisfy these requirements should not be accepted. *See* 19.27.1.11 NMAC (“Applications which are defective as to form or fail to comply with the rules and regulations shall be returned promptly to the applicant with a statement of the changes required.”)

Here, the Application provided incomplete information for the above elements, but it did not designate them by purpose of use. WRD should have

returned the Application to APR with a required statement of changes; it should not have accepted the Application without sufficient specificity as to every purpose of use. This would have resulted in the Application not being accepted until complete under the law. 19.27.1.11 NMAC.⁴ Nevertheless, as the district court concluded, WRD's acceptance of the Application did not override the statutory hurdle of specificity as determined on review by the State Engineer.

B. The Ministerial Act of Accepting An Application For Filing Does Not Prevent the State Engineer From Denying One That is Not Facially Valid

WRD's ministerial act of accepting the Application does not thereafter estop the State Engineer from denying a facially invalid application. Nevertheless, APR argues that not only did WRD's acceptance and publication of the Application prevent the State Engineer from granting the Protestants' Motions to Dismiss, but also that it conferred a statutory and constitutional right to an evidentiary hearing before the State Engineer.⁵ **[BIC 31-32]**. This proposition is incorrect and not supported by the authorities that APR cites.

⁴ To the extent that the WRD requested only limited additional information, the amended Application was still insufficient on its face.

⁵ While APR's Brief in Chief refers to a possible "constitutional problem" (*see, e.g., [BIC 38]*), APR does not support this or any of its other vague allegations of constitutional infirmity with any legal support. The Court does not consider arguments that are not argued with legal support. *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 513. The State Engineer should not be in the position of having to guess what APR's argument on this issue might be and, for this reason,

As the district court correctly found, “[t]he State Engineer is an administrative officer whose office is created by statute, NMSA 1978, § 72-2-1 (1982), and whose authority is thereby ‘limited to the power and authority that is expressly granted and necessarily implied by statute.’” [3 RP 884]. The district court thus concluded that the State Engineer was without discretion to deny the Application because it did not comply with New Mexico law. *Id.* Section 72-12-3 is silent as to the consequences of WRD improvidently accepting a facially invalid application. The statute does require, however, that the State Engineer review all applications and it sets out the manner in which he shall consider them. Specifically, the State Engineer must undertake one of two types of review, depending on whether protests or objections are filed. *See* §§ 72-12-3(E) and (F). The statute mandates that he shall either (1) deny an application in the absence of certain findings, or (2) engage in further analysis of the application and exercise his discretion to deny an application or grant a permit. *Id.*

Here, once the Protestants filed objections to the Application, Section 72-12-3(F) authorized the State Engineer to act on the Application, with or without holding a hearing. Under the statute, he may deny an application if an objection is filed, and he also has discretion to hold a hearing on such an objection. § 72-12-

he has not specifically responded to APR’s unsupported references to the issue in this Answer Brief. APR’s failure to argue this point in its Brief in Chief precludes it from fleshing out that argument in its Reply Brief, since the State Engineer will not have an opportunity to respond to that brief.

3(F). The State Engineer may also deny an application if, in his opinion, a permit should not be issued, and he has discretion to hold a hearing in order to make that determination. *Id.* This broad grant of discretionary authority derives from the Legislature's acknowledgement of the State Engineer's highly specialized knowledge. *See* § 72-12-3(F) (authorizing State Engineer to deny an application if "in his opinion" the permit should not be issued); *see also Lion's Gate*, 2009-NMSC-057, ¶ 24, 147 N.M. at 532 ("The general purpose of the water code's grant of broad powers to the State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process that maximizes resources through its efficiency, while seeking to protect the rights and interests of water rights applicants.").

The district court correctly recognized that the duties set out in Section 72-12-3(C) and (F) for the application process differ. **[3 RP 882]**. The purely administrative nature of ensuring completion of an application before acceptance is set forth at Section 72-12-3(C), in contrast to the substantive review required under Section 72-12-3(F). **[3 RP 882-883]**. This statutory scheme creates an effective and uniform multi-level system of application review and provides checks and balances to ensure that only applications that comply with law are approved, regardless of whether WRD accepted them. Even a facially invalid application that

slips through WRD's initial review process—like APR's—is subject to the State Engineer review procedure articulated in the statutes and rules, just like every other application. Under this multi-level process of reviewing groundwater applications, WRD's acceptance of an application does not alter the State Engineer's statutory authority to determine whether an application is facially valid. The Protestants asserted that the Application is invalid on its face **[1 RP 258-264]** and once that issue was raised by motion the State Engineer had a duty to consider the issue. Even if the Protestants had not advanced that argument, the State Engineer could have denied the Application on the same ground without holding a hearing. Moreover, even if he had decided to hold a hearing on whether the Application met all of the statutory and rule requirements to be facially valid, nothing required that it be a hearing on the merits or an evidentiary hearing.

This case demonstrates the State Engineer's willingness to recognize and correct errors, rather than compound them. The State Engineer overruled the WRD's improvident acceptance of the Application after holding a hearing on the Protestants' objections. **[3 RP 659-662]**. Thus, despite WRD's error, the administrative review process that the Legislature contemplated under the water code occurred in this instance and the result—denial of the Application—was correct. The State Engineer's post-hearing decision to deny the Application remedied WRD's improvident acceptance of the Application.

VIII. AN APPLICATION MUST BE SUFFICIENTLY SPECIFIC TO ALLOW PERSONS TO DETERMINE WHETHER TO OBJECT

APR would have this Court believe that an application to appropriate groundwater submitted to the State Engineer requires no more detail than the notice pleading required for a civil complaint. [BIC 46]. APR asserts, again without supporting authority, that an application only requires basic information because an applicant is automatically entitled to an evidentiary hearing at which the application can be developed. *Id.* This approach is inconsistent with the statutes and rules, which specify the information required for a sufficiently completed application. § 72-12-3(A). By State Engineer rule, an application must set out the elements of water right that would actually be permitted. *See* 19.27.1.10 NMAC (“The application and permit limit the nature and extent of the water right.”)

Without the requirement of a complete, detailed and particularized application, the public is denied the information it needs to make an informed decision regarding whether to protest an application. Only with this information can existing water right owners determine whether their water rights may be impaired if a permit is issued. As previously noted, existing water right owners must demonstrate that they have standing in order to object to applications to appropriate groundwater. Section 72-12-3(D) confers standing only on water right owners (1) whose rights may be impaired by the granting of an application, and (2)

who object on the grounds that granting the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state in the event if they can demonstrate that they will be “substantially and specifically affected by the granting of the application.” (emphasis added). In addition, the rule governing application protests provides that “[a]ny person deeming that the granting of an application would be detrimental to his rights may protest in writing the proposal set forth in the application.” 19.27.1.14 NMAC. This demands that every protest must set forth the reasons why an application should not be approved. *Id.*

Thus, for a water right owner to analyze whether to expend resources and time to protest, applications must be sufficiently specific so that potential protestants can identify the reason for which they object to the application. Vague or incomplete applications deny water right owners the opportunity to make such an analysis and effectively deny them standing to object, since they cannot file sufficiently specific protests. 19.25.2 NMAC (03/11/1998, as amended through 08/30/2013).

Here, over 900 Protestants objected on the grounds that the Application should not be approved because it was so vague that they did not know whether they should file a protest and, if so, what they should protest. [1 RP 65, 165]. In fact, the Application was so vague that it is difficult to assess whether any of the

Protestants actually determined that granting it would be detrimental to their rights before filing their objections. Many of the Protestants may have filed their objections simply as a protective measure. If more concrete information later became available that would allow them to assess if the purposes of use would negatively impact their rights, they would not have missed the opportunity to object. *See* § 72-12-3(D) (requiring objections to the granting of an application to be filed within ten days after last publication of notice).

The Application's vagueness is further evidenced by the State Engineer's uncertainty about APR's intended use of the water right. The State Engineer found that if APR planned to utilize the water rights in one of the ways proposed in the Application, it would potentially have a consumptive irrigation requirement (CIR) of 12.61 acre feet, which would be an impermissible result under New Mexico law because it would constitute waste. [3 RP 661 ¶¶ 9-11]. The Application did not state on its face that the permit would actually put water to use in that manner, though, leading to the State Engineer's query about the possible CIR. If the State Engineer could not determine the intended use of water from the Application, then it follows that neither could lay persons.

This is not the way the application and protest process is intended to work. It is simply not in the public interest for WRD to accept applications that are not

sufficiently specific for potential protestants to assess whether they should—or even may—protest the application.

IX. APR COULD SIMPLY REFILE ITS APPLICATION WITH THE INFORMATION REQUIRED BY LAW

Neither the State Engineer's denial of the Application nor the district court's decision upholding the denial has caused APR an injury that requires this Court's intervention. Instead of appealing the State Engineer's decision to the district court and later filing an appeal with this Court, APR could simply have submitted a new application to the State Engineer that comports with law. Instead of refileing, however, APR suggests that the process may suffer from some unstated constitutional infirmity and it attempts to craft an unsupported argument that it has a right to a statutory evidentiary hearing when none exists. In the absence of any legal support for APR's argument that it was entitled to an evidentiary hearing under Section 72-12-3, the Court should not address the argument. *See State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 513 (stating that the Supreme Court will not review issues raised in appellate briefs that are unsupported by authority and consist of a mere conclusory reference).

APR states that it has taken “steps to develop evidence in support of its Application and expended significant sums of money and resources drilling a test hole and a production well, beginning the necessary hydrologic analysis, and preparing for an evidentiary hearing before the State Engineer.” [BIC 4], *see also*

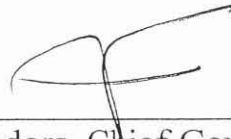
[1 RP 301-303] (discussing APR's complaint to district court that it undertook significant work after filing its Application and that it planned to provide the information missing from its Application at a hearing on the merits). Given these already-completed efforts, APR should be in a position to submit a complete application to appropriate water with the specificity required for State Engineer review without having to expend additional time or resources. This is exactly what the State Engineer contemplated by denying the application without prejudice. [3 RP 662 ¶ 25] (The State Engineer's Order Denying the Application denied the Application "without prejudice to the filing of subsequent applications.") APR could simply withdraw its Application and contemporaneously file a completed application that conforms to law, as the State Engineer has encouraged APR to do, and it may do so even if this Court affirms the district court.

X. CONCLUSION

APR has not cited any legal support for its contention that the State Engineer improperly failed to hold an evidentiary hearing on its Application. Accordingly, for the reasons set forth above the New Mexico State Engineer respectfully requests that the Court uphold the district court's decision that the State Engineer

- (i) properly denied the Application pursuant to NMSA 1978, Section 72-12-3, and
(ii) was not required to hold an evidentiary hearing on the Application.

Respectfully submitted,



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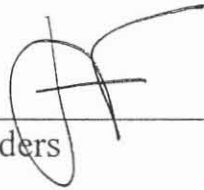
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