STATE OF NEW MEXICO
CATRON COUNTY
SEVENTH JUDICIAL DISTRICT COURT

Augustin Plains Ranch, LLC,	)	
	)	
Applicant/Appellant,	)	
v.	)	No. D-728-CV-2012-08
	)	
Scott A. Verhines, P.E.,	)	Appeal from a decision
	)	of the New Mexico
New Mexico State Engineer/Appellee,	)	State Engineer in OSE Hearing No.
	)	09-096
and,	)	
	)	
Kokopelli Ranch *et al.*,	)	
	)	
Protestants/Appellees.	)	
	)	

REPLY IN SUPPORT OF PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Augustin Plains Ranch, Inc. ("APR") filed an application ("APR's Application") with the State Engineer, seeking to appropriate 54,000 acre-feet of groundwater per year ("AFY") to use for any purpose anywhere within an area of New Mexico that is roughly twice the size of New Jersey. 54,000 AFY is over five times the total annual water consumption of Rio Rancho, New Mexico, and about half that of Albuquerque. APR's Application does not disclose who will use this tremendous volume of water, what they will use it for, or where they will use it.

After notice was published and protests were lodged, the State Engineer commenced an administrative hearing. The Protestants identified below and others filed motions to dismiss APR's Application, arguing that it was invalid on its face. The primary legal basis underlying these motions was that APR's Application failed to manifest any specific intent to appropriate water, and therefore, the Application violated the New Mexico Constitution, the applicable

statutes and regulations, and the long-established common law of prior appropriation (collectively referred to herein as the "governing law"). In addition, because APR's Application failed to manifest the requisite intent, Protestants argued that effective notice could not be provided in accordance with the governing law. After extensive briefing and oral argument, the hearing officer granted Protestants' motions and issued a written order, which the State Engineer subsequently adopted.

The overarching issue in this case is whether the governing law required APR to manifest a specific intent to appropriate water through its Application, at the time of filing, or whether it can wait to disclose its intentions until the State Engineer conducts a full evidentiary hearing. The Court's resolution of this issue will have a profound impact on the future of New Mexico water law and the disposition of New Mexico's remaining unappropriated water resources. If APR is correct, then entire aquifers containing vast supplies of public water can be claimed by the mere filing of a two-page application, regardless of whether the applicant has any need for water himself, or any plan for providing water to others, at the time of filing. The development and exploitation of so-called "public water" would become no different than private mineral development.

APR's position conflicts with over one hundred years of case law and the applicable statutes and regulations. This governing law has always required applicants to manifest their intent to appropriate water, clearly and specifically, at the very initiation of their appropriation, regardless of whether initiation occurs by physical acts on the ground or an application filed with the State Engineer. Absent a specific intent to appropriate water and notice of that intent, there is no legal basis on which to establish a water right or its priority date. Merely saying that 54,000 AFY will be taken and supplied to unknown persons in seven counties fails to show the requisite

intent to appropriate; it only shows the intent to speculate in water, to grab the water now and wait for some demand to develop somewhere later over time. That this is APR's intent is clear on the face of its Application, which fails to identify any third-party user, any specific place of use, or any specific need for the water it would produce.

Throughout its Response, APR demands an "evidentiary hearing on the merits," but this begs the question: "The merits of what?" APR has not told us. Its Application discloses (at most) only half a valid water project—it tells us where the water will come from but, fatally, not where it will go, who will use it, and what they will use it for. Under these circumstances, APR received an appropriate "hearing on the merits," *i.e.*, summary dismissal of its Application after extensive briefing and oral argument. APR was not entitled to an evidentiary hearing. Neither the courts nor the State Engineer are required to provide evidentiary hearings on legally meritless and premature claims. Moreover, APR is not prejudiced by dismissal of its invalid Application. It can refile another application if and when it has a real water project to propose, one that identifies not only the amount of water, but also who will use the water, what they will use it for, and where they will use it. Its current application fails to do this, and therefore, it is invalid on its face and was rightfully dismissed by the State Engineer.

ARGUMENT

1. There is no genuine issue for trial, and therefore, summary judgment is appropriate.

Pursuant to Rule 1-056(D) NMRA, Protestants provided this Court with a concise statement of material facts as to which there is no genuine issue. *Protestants' Brief at 3-8.* Protestants' recitation of the material facts was grounded on documents attached as exhibits to Protestants' *Memorandum in Support of Summary Judgment.* APR does not contest the authenticity of these documents. Nor does APR identify any dispute of material fact within the

meaning of Rule 1-056. Accordingly, pursuant to Rule 1-056, APR has admitted Protestants' statements of material facts *in toto*, as has the State Engineer[1] Rule 1-056(D) NMRA ("All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted.").

Although APR asserts that it disputes "Protestants' narrative description" in several places (*APR Response at 1 ¶1, 2 ¶4, 3 ¶6 and 6 ¶18*), it never actually describes, much less provides evidence to support, any factual dispute. APR's Response contains no "concise statement of the material facts [that it] contends a genuine issue does exist"; it provides no numbered list of "each fact in dispute"; it does not reference "with particularity to those portions of the record upon which [APR] relies"; and it does not "state the number of the [Protestants'] fact that is disputed." Cf. Rule 1-056(D) NMRA (prescribing how disputed material facts shall be identified). APR does not even identify the "narrative descriptions" with which it allegedly takes issue, how it might describe the facts differently, or even whether its alleged issue with Protestants' narrative descriptions is genuine or material.

To create a genuine issue of material fact, APR "may not rest upon … mere allegations or denials." Rule 1-056(E) NMRA. It was required "by affidavits or as otherwise provided in [Rule 1-056 to] set forth specific facts showing that there is a genuine issue for trial." Neither it nor the State Engineer did this. Accordingly, since there is no a genuine issue for trial, this Court may enter summary judgment against APR. Id.

[1] The State Engineer supports the granting of summary judgment and made no attempt to identify for the Court any genuine issue of material fact within the meaning of Rule 1-056. *State Engineer's Response at 1.*

2. In affirming the State Engineer's denial of APR's Application on appeal, this Court is not limited to the narrow legal grounds cited in the State Engineer's Order.

APR does not take issue with Protestants' description of the issue on appeal, *Protestants' Brief at 4*, which is whether the State Engineer was legally justified in denying APR's Application based solely on the contents of APR's Application.[2] The State Engineer, however, contends against his own interest that the issue on appeal is limited to whether "the application ... should not be considered by the State Engineer pursuant to NMSA 1978, § 72-5-7 ...." *State Engineer Response at 1-2* (emphasis added). The State Engineer further argues, without citation to authority, that the issues of "notice and due process" are not before this Court on appeal, even though it is undisputed that Protestants raised and extensively argued these issues below and in their *Motion for Summary Judgment*. Id. at 2. According to the State Engineer, this Court's *de novo* review is strictly limited to a review of the State Engineer's express legal rationale for denying APR's Application.

The State Engineer cited no authority and Protestants are unaware of any authority that supports his position. There is contrary authority, however. In every other context, an appellate court may uphold the lower tribunal's decision "if right for any reason," even if the express legal rationale was erroneous. Cf. Martinez v. Roscoe, 2001 NMCA 83, 10, 131 N.M. 137, 33 P.3d 887 ("On appeal, this Court will affirm the lower court's ruling if right for any reason"); see also Meiboom v. Watson, 2000 NMSC 4, 20, 128 N.M. 536, 994 P.2d 1154 ("This Court may affirm a district court ruling on a ground not relied upon by the district court, [but] will not do so if reliance on the new ground would be unfair to appellant") (internal citations omitted). Thus,

[2] Unless otherwise indicated, "Application" includes APR's original application, amended application, and modified application.

although Lion's Gate[3] limits this Court's *de novo* review to the issue that the State Engineer actually decided, nothing in that case precludes this Court from considering the entire body of law that bears on the issue at hand.[4]

3. APR's Application does not comply with the governing law.

Contrary to APR's suggestion, *ARP Response at 9-14*, its Application fails to "comply with the governing law." Fundamentally, APR's Application violates the governing law because it fails to manifest any specific intent to appropriate water for a definite purpose, at a definite place, and in an amount that is based on the intended purpose and place of use. APR's belief—that it can file a scattershot application now and wait until an "evidentiary hearing" to disclose its specific intentions later—has no support in the governing law.

A. The "governing law" includes common law of prior appropriation, the New Mexico Constitution, and all applicable statutes and regulations.

As a preliminary matter, the "governing law" includes the common law as well as the applicable statutes and regulations of the State Engineer. In Yeo v. Tweedy, the New Mexico Supreme Court held that "both the statute [relating to water rights] and the Constitution in these affirmative provisions [in Article XVI, relating to water rights] are merely declaratory of existing law." Yeo v. Tweedy, 34 N.M. 611, 614, 286 P. 970, 972 (1929). Thus, because they are "merely declaratory," the Constitution, statutes and regulations regarding water rights 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). Citing Trujillo, Yeo holds that the common law of prior appropriation, which was "fully established" in New Mexico by 1912, applies equally to ground water and

[3] Lion's Gate Water v. D'Antonio, 2009 NMSC 57, 147 N.M. 523, 226 P.3d 622.

[4] Furthermore, in addition to Section 72-5-7, the State Engineer expressly considered the statutory requirements of Section 72-12-3 NMSA (id. at 2 ¶ 5), issues of notice (id. at 3 ¶ 9), sound public policy (id. at 3 ¶ 11, 4 ¶¶ 21-23), and public welfare (id. at 2 ¶ 7, 2-3 ¶8).

surface water appropriations, even though the New Mexico Constitution only refers to surface water. Yeo at 614, 286 P. at 972; N.M. Const. Art. XVI, §2.

B. In deciding whether to reject an application, the State Engineer may rely on any applicable provision of the New Mexico Water Code.

APR criticizes the State Engineer for relying on 72-5-7 (*APR Response at 16*), which was originally adopted as part of the Surface Water Code of 1907, but this criticism is unfounded.

> The jurisdiction and duties of the state engineer with reference to streams and underground waters are the same. … There does not exist one body of substantive law relating to appropriation of stream water and another body of law relating to appropriation of underground water. The legislature has provided somewhat different administrative procedure whereby appropriators' rights may be secured from the two sources but the substantive rights, when obtained, are identical.

Albuquerque v. Reynolds, 71 N.M. 428, 437 (1962); cf. Turner v. Bassett, 2005 NMSC 9, 10, 137 N.M. 381, 111 P.3d 701 (noting that "our courts have applied these same laws," involving the transfer of surface water rights, "to cases involving the transfer of groundwater."). Thus, the State Engineer's reliance on Section 72-5-7, which sets forth essentially the same criteria for denial as Section 72-12-3, does not invalidate the State Engineer's denial of APR's Application.

C. Every appropriation of water must begin with a specific intent to apply water to some beneficial use, duly manifested at the time the appropriation is initiated, and this intent (when perfected by beneficial use) serves to limit the nature and extent of the appropriation.

It has long been established in New Mexico and throughout the arid West that:

> An appropriation of waters [cannot] be constructive, but must be actual. As has been shown there must be, first, the bona fide intent to appropriate the waters of a stream and apply the same to some beneficial use or purpose.

Millheiser v. Long, 10 N.M. 99, 106, 61 P. 111, 113-114 (1900); 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."). The appropriator's intent must be specific and manifested in accordance with the governing law. Millheiser provides:

> The laws of this Territory [*circa* 1900] do not require a written notice of intent .... [However, the] intent ... with which water is diverted, it is necessary to gather from some source, in justice to subsequent appropriators, and the absence of the notice may have an important effect in determining the quantity of water sought to be appropriated.

Id. at 107, 61 P. at 114 (emphasis added). The "important effect" alluded to by the Supreme Court in Millheiser was that the defendants' water right was limited by their manifest intent, which was only to appropriate water for use on their own lands. Id. at 113, 61 P. at 116. Accordingly, the defendants' subsequent sales of public water to third parties could not establish a water right, nor could any priority be related back to their original intent, because the sales of water exceeded the limits set by the defendants' original intent. Id. at 117-118, 61 P. at 117-118.

The applicable statutes and regulations incorporate this common law requirement, i.e., that the appropriator's initial intent is an essential and limiting factor of every appropriation.

> [The] filing of a written application with the state engineer, as required by the statute, is but declaring, or the giving of a notice of, an intention to appropriate unappropriated public water.

Sowards v. Meagher, 108 P. 1112, 1117 (Utah 1910); cf. McBee v. Reynolds, 74 N.M. 783, 788, 399 P.2d 110, 114 (1965) ("The [State Engineer's] acceptance of applications [not required by law] could have no effect ... except possibly to give notice and make a record of intention to undertake development of water") (emphasis added). Section 75-5-1 (1953) NMSA provides:

> Any person ... hereafter intending to acquire the right to the beneficial use of any waters, shall ... make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him. Such rules and regulations ... shall ... require the applicant to ... [provide] all other data necessary for the proper description and limitation of the right applied.

(Emphasis added); cf. NMAC § 19.27.1.10 ("The application and permit limit the nature and extent of the water right."). Notice of the application must be provided "upon" filing. NMSA 1978, 72-5-4(2001). The express purpose of notice is to provide "all essential facts as to the proposed appropriation," including "the places of appropriation and of use, amount of water, [and] the purpose for which it is to be used ...." Id.; NMSA 1978, § 72-12-3 (2001) (imposing essentially the same application and notice requirements as to appropriation of ground water).

D. APR's Application does not manifest any specific intent to appropriate water within the meaning of the governing law.

APR agrees that the purpose of an application is to manifest the applicant's specific intent to appropriate water. *APR Response at 13*. But in the same brief, APR also asserts:

> The whole purpose of the evidentiary hearing before the OSE ... is to adduce ... evidence as to whether and how the amount of water applied for will be put to beneficial use. *APR Response at 19* (emphasis added).
>
> ... if allowed to present its evidence, [APR] will bear the burden of showing how that water will be put to beneficial use. *APR Response at 12.*

These statements are admissions by APR that it lacks any specific intent to appropriate water—it does not know yet "whether and how" it will "put water to beneficial use." Even without these candid admissions, however, the record shows clearly that APR has no idea how or whether it will put water to beneficial use. *Original Application—Attachment B* (describing numerous possible alternative scenarios).[5] This is clear on the face of its Amended Application.

> The purpose of this Amended Application[6] is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply of the Rio Grande Basin in New Mexico.

[5] The Original Application is attached as Exhibit B to Protestants' *Memorandum in Support.*

[6] Contrary to APR's most recent claim, *APR Response at 2, fn. 2*, its Amended Application has not "superceded the Original Application." First, the State Engineer's regulations do not allow "amended applications." And second, APR never withdrew the Original Application from consideration or otherwise indicated below that the Amended Application "superceded" the Original Application.

Amended Application at 2 ¶ 7.[7] Nothing in the foregoing statement, or in any other document,[8] discloses the "essential facts" of an actual appropriation. APR does not disclose the route of the "pipeline" or the location of the alleged "existing uses" and "new uses" referred to in its Application. No end users are identified. As a matter of pure speculation, the undisclosed "uses" might exist virtually anywhere, now or in the future, within seven New Mexico counties—an area that is over twice the size of New Jersey. And the purpose of these "uses" could be anything under the sun—"domestic, livestock, irrigation, municipal, industrial, commercial, environmental, recreational, subdivision and related replacement and augmentation." *Amended Application at 1 ¶5* and Attachment B. As a matter of law, such unbounded intent cannot possibly form the basis of a valid water right, a permit to establish a water right, or a priority date.

The governing statute required specificity, which APR's Application failed to provide. Among other things, the statute required APR to "designate … the beneficial use to which the water will be applied" and the "place of use." NMSA 1978, § 72-12-3(A)(2); see also NMSA 1978, § 72-12-3(D) (requiring notice of applications to be published, including "where the water will be or has been put to beneficial use") (emphasis added). APR's Application only discloses how and where water might be applied. APR's Application does not designate any "specific use," as called for on the State Engineer's application form. Accordingly, the State Engineer was compelled to deny APR's Application, because he has no authority or jurisdiction to approve an application that discloses no intent "to appropriate [water] for beneficial use …." NMSA 1978, §

[7] The Amended Application is attached as Exhibit C to Protestants' *Memorandum in Support*.

[8] Significantly, APR failed to describe any "specific use" on its Application. *Amended Application at 1 ¶5.*

72-12-3; Yeo 34 N.M. at 625, 286 P. at 976 (holding that the State Engineer can only "have such jurisdiction as the statute gives him.").

APR's reliance on Mathers v. Texaco, Inc., 77 N.M. 239, 421 P.2d 771 (1966), *APR Response at 13-14*, to support its Application is misplaced. Contrary to APR's suggestion, nothing in Mathers allows applicants to designate the "purpose" and "place of use" on their applications as "any and all purposes" and "seven counties," respectively. On the contrary, the multiple applications[9] at issue in Mathers left no doubt as to the purpose and place of use intended by Texaco:

> Here the applicant, Texaco, has 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.

Id. at 248, 421 P.2d at 777-778. In stark contrast to Texaco, APR failed to specify "the particular use for which water is to be appropriated and the precise lands to which the same is to be applied." Accordingly, Mathers does not support APR's position; it supports the Protestants' position.

4. APR's intent to speculate in water is manifest on the face of its Application, and, in any event, no evidentiary hearing is required on the issue of speculation.

APR admits that the "State Engineer may refuse to allow or recognize an appropriation that is motivated by an intent to monopolize or speculate in the sale of the water," *APR Response at 25*, but it argues that the State Engineer cannot determine on the face of an application whether it is unlawfully speculative. *APR Response at 25-27.* This argument is a "red herring." The State Engineer properly dismissed the Application because, on its face, the Application was

[9] It is unclear why APR contends that only one application was at issue in Mather, *APR Response at 13, fn. 4*, which throughout refers to multiple applications. See, e.g., Mathers, 77 N.M. at 247 ("The applications were made on forms furnished and prescribed by the State Engineer").

vague and failed to manifest any specific intent to appropriate water. APR's unmanifested subjective intent not relevant.

APR's improper speculative intent is, however, clearly manifest on the face of its Application. Vidler is instructive on this point. In that case the Colorado Supreme Court ascertained the applicant's speculative intent from facts comparable to those presented on the face of APR's Application:

> Vidler has no firm contractual commitment from any municipality to use any of the water. ... Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would -- as a practical matter -- discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains. Twenty-five years ago this Court emphatically rejected the claim that mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent bona fide appropriators to pay them tribute[10] by purchasing their claims in order to acquire a right guaranteed them by our Constitution. ...
>
> While Vidler's efforts possibly went beyond mere speculation, there was no sufficient evidence that it represented anyone committed to actual beneficial use of the water not intended for use on its own land. Indeed, there is not even evidence of firm sale arrangements. In essence, water rights are sought here on the assumption that growing population will produce a general need for more water in the future. But Vidler has no contract or agency relationship justifying its claim to represent those whose future needs are asserted.

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[10] Forbidding would-be monopolists from commandeering vital public resources and forcing the public to pay them "tribute" is also a theme in New Mexico water cases, Millheiser v. Long, 10 N.M. at 116; Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177 (1900), as well as generally. See, e.g., Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969) ("If [patent licensees] are muzzled, the public may continually be required to pay tribute to would-be monopolists" of ideas in the public domain.")

Id. at 568-569 (internal quotes and citations omitted). Like Vidler, APR has no contractual commitment from any third party to provide water and no plan to provide water in the future to any ascertainable person. APR "cannot take the water now with a mere hope of possible sales in the future …," Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1135 (10th Cir. N.M. 1981), nor can it "file [its] application … and wait for something to happen." Sowards v. Meagher, 108 P. 1112, 1117 (Utah 1910). The State Engineer, therefore, properly dismissed APR's Application.

5. In denying APR's Application, the State Engineer was not required to conduct any hearing, much less an evidentiary hearing.

APR claims that the State Engineer could not determine the facial validity of its Application unless he first conducts a full-blown evidentiary hearing, in which APR would be allowed to adduce evidence on every possible substantive issue, including feasibility, speculation, impairment, detriment to public welfare, and conservation of water, etc. *APR Response at 19, 20, 25, 26, and 28.* In other words, APR would have the State Engineer conduct mandatory evidentiary hearings in virtually every case, even on legally meritless applications. This claim is contrary to the governing law.

The general application process is described in Section 72-12-3 NMSA. "Upon the filing of an application, the state engineer shall cause to be published in a newspaper … a notice that the application has been filed and that objections to the granting of the application may be filed …." NMSA 1978, § 72-3-12(D). The statute goes on to provide:

> If objections or protests have been filed within the time prescribed in the notice or if the state engineer is of the opinion that the permit should not be issued, the state engineer may deny the application without a hearing or, before he acts on the application, may order that a hearing be held.

NMSA 1978, § 72-3-12(F)(emphasis added). Thus, the State Engineer may deny any application "without a hearing," even after he orders notice to be published. Id. Moreover, nothing in the governing law requires the State Engineer to conduct an "evidentiary hearing" after he determines that an application—at any point in the process—is legally defective on its face or otherwise invalid.

In arguing for an evidentiary hearing, APR also relies on the Colorado case of Colorado v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (Colo. 1983). *APR Response at 27.* Although the substantive water law and Colorado and New Mexico derive from the same common law of prior appropriation, there are critical procedural differences between the two states. As a result, APR's reliance of Southwestern is misplaced.

Under Colorado law, a person who seeks a new appropriation of water must file an application for a "conditional water right" in a Colorado state court. See, e.g., Vought v. Stucker Mesa Domestic Pipeline Co. (In re Vought), 76 P.3d 906, 911-912 (Colo. 2003).

> A conditional water right is the right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based. … A conditional water decree determines that the first steps toward appropriating a certain amount of water have been taken and the decree establishes the date when this occurred. … The priority date of the completed appropriation relates back to the date established by the conditional decree so long as the applicant has proceeded with due diligence thereafter to perfect the appropriation.

Vidler, 594 P.2d at 567 (internal cites and quotes omitted, emphasis added). The purpose of the "first step" referred to by the court is to demonstrate the applicant's "intent [to appropriate] by an open physical *act* sufficient to constitute notice to third parties." Id. at 568 (emphasis in original).

Given the fact-intensive nature of Colorado's process, which requires the court to ascertain when and what physical "first steps" the applicant took prior to filing its

application, it is not surprising that motions to dismiss based solely on the contents of an application are inappropriate in Colorado. Applications to appropriate water in Colorado, unlike New Mexico, must allege facts that occurred in the past, before the application is filed, including physical acts that allegedly manifest the applicant's specific intention to appropriate water. As in any other case involving disputed conduct that occurred in the past, the court must hear and evaluate all the evidence before it rules. But this is not the case in New Mexico. Here, the application itself must manifest the applicant's intent to appropriate, and therefore, APR's reliance on Southwestern and related Colorado case law is misplaced.

Also misplaced is APR's reliance on tort cases to argue for an evidentiary hearing. *APR Response at 25-26*. Evidentiary hearings are required in tort cases because the defendant's past actions and intent are often in dispute. In the instant case, there is no argument over APR's past intent or conduct. Its Application speaks for itself, and it fails to manifest the requisite intent to appropriate water.

APR's argument that in "all but one of those cases [cited by Protestants], the speculative nature of the right [sic] at issue was found only after one or more evidentiary hearings," *APR Response at 26*, is also unavailing. In each of the cited New Mexico cases, there was a specific water project on the table—a proposed ditch in Turley and Hinderlider; an existing ditch in Millheiser; and the proposed storage of San Juan-Chama water in Elephant Butte Reservoir in Jicarilla.[11] In stark contrast, APR has no particular use or disposition of water in mind.

[11] For the reasons stated above, the unique procedural aspects of Colorado law makes Vidler inapposite.

6. APR's alleged "reliance" on OSE's initial acceptance of APR's Application did not preclude the State Engineer from denying the Application for failure to comply with the governing law.

APR alleges, without supporting affidavits, that it relied on OSE's initial acceptance of its invalid Application. It argues that OSE's initial acceptance of its Application and authorization to publish notice means, *ipso facto*, that the Application is valid and must to go an evidentiary hearing. *APR Response at 4 ¶10, 14-16.* APR's argument has no merit.

The regulations of the State Engineer provide that the "completeness and accuracy of the notice for publication is the responsibility of the applicant," and if "there are substantive errors in the published notice, it shall be re-advertised at the expense of the applicant. § 19.27.1.13 NMAC. The regulations further provide that "issuance of a notice for publication does not in any way indicate favorable action on the application by the state engineer." 19.27.1.12 NMAC. Thus, APR's alleged reliance on OSE is misplaced.

Moreover, APR's reliance argument "is in the nature of an estoppel, which does not apply to a sovereign state where public waters are involved." 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) ("Public policy forbids the application of the doctrine of estoppel to a sovereign state where public waters are involved.") Even if estoppel were possible, the OSE staff's failure to immediately reject APR's invalid application does not immunize the Application from attack, or prevent the State Engineer from correcting the error of his staff, or preclude Protestants from pointing out the invalidity in the hearing below and insisting on dismissal. See State ex rel. Erickson v. McLean, 62 N.M. 264, 273, 308 P.2d 983, 989 (1957) ("The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time"); cf. Hanson v. Turney, 2004 NMCA 69, 21, 136 N.M.

1, 94 P.3d 1("The fact that an agency overlooked a particular requirement in one case does not estop it from enforcing the requirements in another case."). Accordingly, APR's alleged reliance did not preclude the State Engineer from denying APR's Application.

7. The State Engineer duly considered APR's Application and afforded it an appropriate "hearing on the merits."

APR argues that its Application … should not have been rejected without a hearing on the merits." *APR Response at 18.* It also claims that the State Engineer did not even "consider" its application. *APR Response at 8-9.* APR is mistaken. The State Engineer gave its Application due consideration and only denied the Application after allowing APR to submit argument and evidence and conducting an appropriate hearing "on the merits."

The statutes granting applicants and others the right to an administrative hearing are "intended to ensure that the state engineer affords an appropriate degree of process to the parties before a final decision is entered." D'Antonio v. Garcia, 2008 NMCA 139, 9, 145 N.M. 95, 194 P.3d 126. In the instant case, following notice and protest, the State Engineer commenced an administrative hearing. Shortly thereafter, Protestants filed motions to dismiss the Application. Although the parties described these filings as "motions to dismiss," they included "matters outside the pleadings" and thus are appropriately considered motions for summary judgment. Rule 1-012(B) NMRA; Delfino v. Griffo, 2011 NMSC 15, 10, 150 N.M. 97, 257 P.3d 917 ("We review motions to dismiss as motions for summary judgment when the district court considered matters outside the pleadings in making its ruling.").

"A summary judgment is a decision on the merits of the case." Cordova v. Taxation & Revenue, Prop. Tax Div., 2005 NMCA 9, 38, 136 N.M. 713, 104 P.3d 1104. So are dismissals under Rule 1-012(B)(6). 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"). Summary judgments save parties and courts time and money by avoiding costly trials when there is no genuine issue of material fact, as in the instant case. Similarly, Rule 1-012(b)(6) avoids waste of time and money on pointless evidentiary hearings of legally meritless claims, such as APR's Application.

Moreover, although he did not conduct an evidentiary hearing, the State Engineer did afford APR an appropriate hearing on the merits of its application, giving it a full and fair opportunity to present argument and evidence. Thus, the record in this case belies APR's claim that it was not afforded a "hearing on the merits of its application." Cf. Lion's Gate Water v. D'Antonio, 2009 NMSC 57, 147 N.M. 523, 226 P.3d 622 (affirming State Engineer's denial of an application, on summary judgment, based on the "threshold issue" of water availability).

Contrary to APR's suggestion, Lion's Gate does not require the State Engineer to conduct a full evidentiary hearing on the statutory issues of impairment, etc., on every application, *APR Response at 19-20*, except in cases where water is unavailable for appropriation. Indeed, the Court of Appeals recently relied on Lion's Gate to hold that an applicant was not entitled to an evidentiary hearing on the issues of impairment, public welfare, and conservation until he fully litigated the "threshold issue" of forfeiture. Headen v. D'Antonio, 2011 NMCA 58, P9, 149 N.M. 667, 253 P.3d 957. The Court held:

> In regard to the necessity for an applicant to exhaust the administrative process, 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 the present case. ... [For] Headen to overcome the pre-hearing determination of forfeiture based on the Supreme Court's holding in Lion's Gate, Headen had to continue with the administrative [hearing] process and then force the State Engineer in a statutory de novo hearing in the district court to prove the forfeiture and persuade the court to extinguish the water right.

Id. Similar to Lion's Gate and Headen, the facial validity of APR's Application presents a threshold issue, one that is appropriately decided on a motion to dismiss or motion for summary

judgment. Id.; NMSA 1978, 72-12-3(C) (providing that "no application shall be accepted by the state engineer unless it is accompanied by all the [required] information"). Alternatively, the State Engineer could have denied APR's Application, based solely on its contents, without conducting any hearing. NMSA 1978, 72-12-3(F) (allowing the State Engineer to deny any application, after publication, "without a hearing").

8. Effective notice of a vague application that manifests no intent to appropriate water is impossible to provide, and Protestants have standing to raise this issue.

APR and the State Engineer claim that notice was adequate in this case. *APR Response at 20-22; State Engineer Response at 2-4.* They are mistaken. As set out above, the purpose of the application and notice is to clearly manifest the applicant's specific intent to appropriate water. APR's Application gives no indication of how or where APR intends to use 54,000 AFY. It only indicates that the water might be used by anyone for any purpose anywhere in a vast area of New Mexico. Accordingly, legally effective notice cannot be provided, because APR has no specific intent to provide notice of. Pursuant to Section 72-12-3(D) NMSA, APR was required to provide notice "in each county where the water will be or has been put to beneficial use," not where water *might* be put to beneficial use.

Moreover, the ambiguity as to APR's intended place of use is analogous to the defective notice in Eldorado at Santa Fe, Inc. v. Cook. In Eldorado, the Court of Appeals held that an error in the published notice of an application violated "statutory procedures "and thus "violated petitioners' due process rights, and no subsequent act could correct the defect." 113 N.M. 33, 35, 822 P.2d 672, 674 (Ct. App. 1991). The published notice indicated that the appropriation would occur in the Canada de Los Alamos [Land] Grant when, in fact, it would occur in the Bishop John Lamy [Land] Grant. Id. at 34, 822 P.2d at 673. As a result, "the notice contained a

substantive error," id. at 37, 822 P.2d at 676, which deprived the State Engineer of jurisdiction to consider the application. Id. at 38, 822 P.2d at 677.

The defective notice in Eldorado pales in comparison to the defective notice in the instant case. In Eldorado, the ambiguity as to location amounted to a few hundred feet, id. at 37, 822 P.2d at 676, whereas the ambiguity in the instant case encompasses millions of acres and extends to APR's intentions as to purpose of use. Under APR's Application, water might be appropriated for domestic use in Santa Fe, municipal use in Belen, irrigation in Catron County, or industrial use in Las Cruces, which is not much different from saying water might be used for any purpose anywhere in New Mexico. Effective notice of such an ambiguous and vague application is not possible.

APR argues that Petitioners lack standing to complain about any defect in notice, because Petitioners and others obviously received notice and filed protests. APR misses the point and raises the same invalid argument that the New Mexico Environment Department ("NMED") asserted in Martinez v. Maggiore (In re Northeastern N.M. Reg'l Landfill), 2003 NMCA 43, 133 N.M. 472, 64 P.3d 499. The primary purpose of statutory public notice requirement is not to give actual notice to "particular individuals," but to apprise *all* who might be affected by the application. Id. The class of potentially affected persons is not limited to water rights owners or permittees, but expressly includes everyone who may "be substantially and specifically affected by the granting of the application," including the State of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions, and all political subdivisions of the state and their agencies, instrumentalities and institutions." NMSA 1978, § 72-12-3(D).

Martinez establishes the standard for allowing parties in a case to "vindicat[e] the general public's right to participate in the permitting process in addition to their own right to proper

statutory notice." Martinez ¶ 18. Protestants meet the standard set by Martinez. First, Protestants claim "an injury in fact," i.e., that the granting of the APR's application will impair their water rights and violate the other statutory criteria for issuance of a permit. Id. ¶ 19. Second, Protestants and "absent opponents" of APR's Application "share an important interest in insuring that" APR's Application does "not adversely affect" their water rights or violate the other statutory criteria. Id. "Third, absent opponents of [APR's] application have been hindered in participating in the permitting process by … failure to publish notice as required by Subsection [72-12-3(D)]." Id. Therefore, pursuant to Martinez, Protestants have standing to vindicate the public's right to proper notice.

Moreover, if the APR were correct, then no one could successfully challenge a published notice. OSE, having approved the notice, would be estopped from complaining, Protestants would lack standing, and those directly injured by improper notice would be absent from the hearing. This absurd result could not have been intended by the Legislature, because it would defeat the purpose of imposing statutory notice requirements.

CONCLUSION

APR's Application, on its face, fails to comply with the governing law. It fails fundamentally, because it does not manifest any intent so appropriate water for a specific purpose and place of use. The amount of water requested by APR, moreover, is not based on, measured by, or limited to any particular beneficial use. It is just a very large number. Notice of APR's Application also failed to comply with the governing law, because APR's Application failed to manifest any specific intent to appropriate water.

WHEREFORE, Protestants respectfully request this Court to grant summary judgment, upholding the State Engineer's Order Denying Application and dismissing this appeal.

Respectfully submitted:

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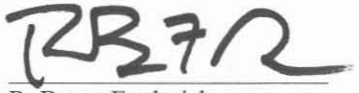
CERTIFICATE OF SERVICE: I certify that I e-filed this document on September 11, 2012, emailed it to the parties' attorneys below on the same date, and that I caused a copy of this document to be mailed to the same attorneys on September 12, 2012.



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