



Mark Reynolds

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**PUEBLO OF SANDIA,**

*Protestant-Appellee,*

v.

**CITY OF RIO RANCHO,**

*Co-Applicant-Appellant,*

and

**ANNABELLE M. BENAVIDEZ,  
and ANDRES A. BENAVIDEZ,**

*Co-Applicants,*

and

**MIKE HAMMAN, New Mexico State  
Engineer,**

*Appellee-Appellant.*

**A-1-CA-42980**

consolidated with

A-1-CA-42977

Sandoval County

D-1329-CV-2023-00820

consolidated with

D-1329-CV-2023-00821

The Honorable George P. Eichwald  
Thirteenth Judicial District Court

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**PUEBLO OF SANDIA,**

*Protestant-Appellee,*

v.

**CITY OF RIO RANCHO,**

*Co-Applicant-Appellant,*

and

**SCOTT TODD, LLC,**

*Co-Applicant,*

and

**MIKE HAMMAN, New Mexico State Engineer,**

*Appellee-Appellant.*

**NEW MEXICO ENVIRONMENTAL LAW CENTER AND NEW MEXICO  
WILDERNESS ALLIANCE'S UNOPPOSED MOTION FOR LEAVE TO  
FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PROTESTANT-  
APPELLEE PUEBLO OF SANDIA**

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The New Mexico Environmental Law Center and the New Mexico Wilderness Alliance (collectively, “*Amici Curiae* Movants”) respectfully request leave of the Court to file an *Amicus Curiae* brief in support of the Protestant-Appellee Pueblo of Sandia. This motion is made pursuant to Rule 12-320(A) NMRA and is timely filed under Rules 12-320(D)(2)(a) and 12-308(A) NMRA.

I. Interest of the *Amici Curiae* Movants

*Amici Curiae* Movants are two environmental organizations in New Mexico with extensive experience in advocacy for public policy, legislation, regulation and agency action that upholds New Mexico’s commitment to protect and enhance its natural resources and to protect its frontline communities from environmental and cultural degradation.

New Mexico Environmental Law Center (“NMELC”) is a nonprofit 501(c)(3) dedicated to defending environmental justice since 1987. NMELC’s mission is to work with New Mexico’s communities to protect air, land and water. NMELC believes that if the water, land, air, wildlife, ecosystems and the traditional and frontline communities they support are not adequately respected or protected, then the fundamental human rights to which all are entitled cannot be realized. NMELC stands beside and supports several frontline communities in the fight to protect their water, be it in aquifers or watersheds. Water is a precious and depleting

common pool resource basic to our needs – essentially, culturally, recreationally, and aesthetically. Water is critical to support New Mexico’s ecosystems, fish and wildlife, and biodiversity, and it is crucial that New Mexico move forward, as the District Court did in the instant case, to meaningfully frame and apply statutory public welfare in a manner that benefits the state and results in the wise use of water.

New Mexico Wilderness Alliance (“New Mexico Wild”) is a nonprofit 501(c)(3) grassroots organization dedicated to the protection, restoration, and continued enjoyment of New Mexico’s waters, wildlands, and wilderness areas. New Mexico Wild represents thousands of individual members from all corners of New Mexico and across the nation. New Mexico Wild has engaged in a variety of avenues working to protect and restore New Mexico’s waterways. Much of New Mexico Wild’s water work is centered on advocating for instream flows sufficient to support habitat and healthy rivers, and on ensuring equitable and collaborative water management. Public welfare determinations directly influence the ability to advance policies that support instream flows, the ability to protest water transfers that are contradictory to this goal and are central to providing mechanisms for New Mexicans to participate in water management decisions, a key component to ensuring equity.

*Amici Curiae* Movants have a shared interest in the administration of New Mexico water rights to fulfill ecological and cultural needs in furtherance of statutory requirements to consider public interest values when evaluating water rights transfer applications under the New Mexico water code, NMSA 1978, Sections 72-5-23 and -24.

*Amici Curiae* Movants have a shared interest in administrative and judicial recognition that instream, nonconsumptive water use constitutes a beneficial use under New Mexico law, N.M. Const. Art. XVI, Sec. 3, and that these beneficial uses can be recognized and administered outside of (and prior to) a formal water rights adjudication, as the district court did in this case.

*Amici Curiae* Movants have a shared interest in ensuring the administration of water rights in New Mexico takes water quality standards into account in furtherance of the public welfare of the state, as well as when determining whether there is impairment of existing rights.

II. Brief of *Amici Curiae* Movants is Relevant, Not Duplicative, and Would Assist the Court

*Amici Curiae* Movants are in a position to provide a perspective that would assist the Court in recognizing the need for New Mexico Courts to address the public interest and values in water administration in the state.

The conditional amicus brief addresses relevant matters, from a perspective that is not covered by the briefs of the parties:

- A. In 1985, the New Mexico Legislature added statutory criteria to promote conservation of water and prevent detriment to the public welfare to the New Mexico water code transfer statute, NMSA 1978, § 72-5-23, to serve as check on unbridled transfers of water rights, including transfer of water rights to other states.
- B. The public interest in water uses and management in New Mexico extends far beyond its economic benefits and includes cultural, aesthetic, fish and wildlife, ecosystem support, and public recreation. Other western states, the majority of which require a public interest review in water management decisions, have included defining elements of public interest in statute, regulation and case law.
- C. Public interest in water in western states has shifted to “favoring a balance between using water consumptively for economic development and maintaining *instream flows for their public values* - that is, for their

recreational, aesthetic, water quality, and fish and wildlife habitat benefits . . .  
.”<sup>1</sup>

D. The Office of the State Engineer erred in its application of the statutory criterion of public welfare in the instant case and, to date, has engaged in a very limited review of public interest in water. It is incumbent on New Mexico Courts to take the lead in clarifying the framework for evaluating public welfare and to identify factors and evidence that are relevant to the public welfare analysis.

E. New Mexico has a long history of stewarding water resources as a public value. Cultural and traditional water uses are distinctly important and relevant public interest values that should be considered in water management in New Mexico, including communal, pueblo, and tribal use of nonconsumptive and consumptive uses of water.

### III. Notice to the Parties of Intention to File *Amicus Curiae* Brief

The undersigned provided electronic notice of the *Amici Curiae* Movants' intention to file an *amicus curiae* brief by email to all counsel on April 9, 2026. This notice met the fourteen day notice period specified in Rules 12-320(D)(1) and 12-

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<sup>1</sup> Douglas A. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, *Water Law Review*, Volume 9, Issue 2, 483, 495 (2006)

308(A) NMRA. In response to the email notice, counsel for the Pueblo of Sandia, counsel for the City of Rio Rancho, and counsel for the State Engineer stated that they do not oppose the *Amici Curiae* Movants' filing of an *amicus curiae* brief. Movants note that the Court has allowed the *amici* in support of the Appellants, which further supports the Court granting of this motion for *amici* in support of the Appellees.

*Amici Curiae* Movants request that the Court grant this motion for good cause shown and in accordance with the requirements of Rule 12-320 NMRA, and accept the attached conditionally filed *amicus curiae* brief.

Respectfully submitted,

/s/ Ann McCartney

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was electronically served on the following on April 27, 2026:

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**MIKE HAMMAN, New Mexico State Engineer,**

*Appellee-Appellant.*

**BRIEF OF *AMICUS CURIAE* OF NEW MEXICO ENVIRONMENTAL  
LAW CENTER AND NEW MEXICO WILDERNESS ALLIANCE IN  
SUPPORT OF APPELLEE PUEBLO OF SANDIA**

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## **STATEMENT OF COMPLIANCE**

In accordance with Rule 12-318 (F)(2) NMRA, undersigned counsel certifies that this brief was prepared in 14 point Times New Roman typeface using Microsoft Office Word and that the body of the brief does not exceed thirty-five (35) pages.

## **STATEMENT REGARDING TRANSCRIPT REFERENCES**

The hearing of November 13, 2024, and the trial of March 10-13, 2025, were transcribed by court reporters. This brief refers to citations to these transcripts by date, page, and line, and not the ForTheRecord (FTR) software recording. Record Proper citations are cited as “RP.” Exhibits are cited as “Ex.” Joint exhibits are cited as “JX.”

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## SUMMARY OF PROCEEDINGS

The New Mexico Environmental Law Center (“NMELC”) and the New Mexico Wilderness Alliance (“New Mexico Wild”), (collectively, “Environmental *Amici*”), adopt the Summary of Proceedings in the Pueblo of Sandia’s (“Sandia” or “Pueblo”) Answer Brief.

### STATEMENT OF INTEREST OF ENVIRONMENTAL *AMICI*<sup>1</sup>

*Amicus* New Mexico Environmental Law Center is a nonprofit 501(c)(3) dedicated to defending environmental justice since 1987. NMELC’s mission is to work with New Mexico’s communities to protect air, land, and water. NMELC believes that if the water, land, air, wildlife, ecosystems and the traditional and frontline communities they support are not adequately respected or protected, then the fundamental human rights to which all are entitled cannot be realized. NMELC stands beside and supports several frontline communities in the fight to protect their water, be it in aquifers or watersheds. Water is a precious and depleting common pool resource. Water is basic to our needs – essentially, culturally,

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<sup>1</sup> Pursuant to Rule 12-320(C) NMRA, Environmental *Amici* disclose that no counsel for a party authored this brief in whole or in part. Further, no counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person contributed money that was intended to fund the preparation or submission of this brief. Pursuant to Rule 12-320(D)(1) NMRA, Environmental *Amici* have ensured that the parties received notice of the intention to file a motion and *amicus* brief at least fourteen (14) days prior to the due date of the motion and brief. Notice was sent to the parties on April 9, 2026.

recreationally, and aesthetically. Water is critical to support New Mexico's ecosystems, fish and wildlife, and biodiversity, and it is crucial that New Mexico move forward, as the District Court did in the instant case, to meaningfully frame and apply statutory public welfare in a manner that benefits the state and results in the wise use of water.

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## **INTRODUCTION**

New Mexico has never veered from the bedrock principle that its natural waters belong to the public. The imperative to consider public welfare is embedded

in New Mexico's legal framework and reflects the state's longstanding commitment to thoughtful management of public waters. Nowhere is this more important than in the treatment of and regard for the Rio Grande, its ecosystems, and the New Mexico communities, traditional users, and sovereign Pueblos that live alongside and rely upon the river. Not only is the Rio Grande the largest river system in the arid state of New Mexico, but it is also one of the longest in North America and in need of deliberate and careful stewardship by the state.

In this case, Sandia is defending not only its own right to beneficial instream use of the Rio Grande for cultural and traditional purposes, but also public welfare values that benefit New Mexico as a whole. As elucidated by the United States Supreme Court,

few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. . . . The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

*Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

The Pueblo has relied on its connection with and use of the instream flow of the Rio Grande since time immemorial. The riparian ecosystems along the river

have evolved as the channeling of the river water occurred, and its bosque ecosystems have been in place for well over a century. Now, more than ever, as water resources deplete in every New Mexico river and water source due to elevated temperatures and low snowpacks, it is imperative that the public interest in New Mexico's waters receive paramount attention.

Environmental *Amici* offer this brief in support of the Pueblo to assist the Court in evaluating the criteria that apply to water transfer applications, and especially the public welfare criterion. The district court correctly considered and found persuasive evidence that Sandia has time-immemorial instream water rights arising under federal law; that Sandia's traditional and cultural practices require sufficient instream flow and water quality; and that Sandia's traditional and cultural practices are an important part of the State of New Mexico's traditions and history, and are therefore relevant to the public welfare inquiry. This Court should affirm the district court.

## **ARGUMENT**

### **A. The Office of the State Engineer Erred in its Application of the Section 72-5-23 Criteria to the City's Transfer Applications.**

New Mexico's water code makes the Office of the State Engineer ("OSE") responsible for the management and administration of water resources throughout the state. *See* NMSA 1978, §§ 72-2-1 to -20 (1907, as amended through 2019); *id.* § 72-2-1 (providing that the OSE "has general supervision of waters of the state

and of the measurement, appropriation, distribution thereof and such other duties as required”). The Supreme Court has recognized that the Office of the State Engineer has a fundamental duty and mandatory obligation to implement and administer the allocation of water rights in New Mexico, subject to judicial appeal. *See Lion’s Gate Water v. D’Antonio*, 2009-NMSC-057, ¶ 20, 147 N.M. 523, 226 P.3d 622.

Under its statutory authority, the OSE issued the 2003 permit for the City of Rio Rancho (“City”), which includes a condition for the City to, “over time, acquire and retire valid consumptive-use surface-water rights equal to the amount of its groundwater pumping” for the purpose of offsetting surface water depletions, in recognition of the hydrological connection between groundwater and surface water. **[RP 7784]** The 2003 permit includes an express condition that the permit “shall not be exercised to the detriment of valid existing water rights or in a manner that is contrary to the conservation of water within the state or detrimental to the public welfare of the State of New Mexico.” **[JX 58, City’s 2003 Permit, page 19-20 FOF 58 and page 26-29, COA 3]** **[RP 7785]** This permit condition tracks the language of the statute that governs the water rights transfers in this case, NMSA 1978, § 72-5-23 (1907, as amended through 1985), which provides in relevant part that a transfer may be allowed if the transfer can be made “without losing priority of right theretofore established, if such changes can be made

without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state.” Thus, the OSE has an obligation under both New Mexico law and the terms of the 2003 permit to ensure that the City’s transfer of water rights is accomplished without impairing existing water rights or causing detriment to the public welfare of New Mexico.

Although the water code and the terms of the 2003 permit both require the OSE to evaluate three transfer criteria, including impairment of existing rights, water conservation, and public welfare, the OSE failed to meaningfully consider the criteria. Instead, the OSE approved the transfers based on its interpretation and experience implementing the Middle Grande Resource Administrative Area (“MRGAA”) Guidelines.<sup>2</sup> The MRGAA Guidelines describe the OSE’s practice of conjunctively managing surface water and groundwater resources along the Middle Rio Grande to ensure that transfers do not cause net depletions to the river’s surface water or compromise compliance with the Rio Grande Compact. *See Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶¶ 14-15, 141 N.M. 21, 150 P.3d 971.

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<sup>2</sup> *See* Office of the New Mexico State Engineer, Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications (2000), <http://www.ose.state.nm.us/doing-business/mrgbasin/crit9-13.pdf>.

The three transfer criteria, embedded in statute and incorporated into the 2003 permit, are necessary to prevent harm to water rights holders and the public, and cannot be satisfied by mere compliance with the MRGAA Guidelines. To meaningfully implement Section 72-5-23, the OSE must evaluate the three transfer criteria at the time a water transfer application is made. *See Montgomery, 2007-NMSC-002, ¶ 28* (“The State Engineer has a statutory obligation to determine if existing water rights will be impaired *when a transfer application is filed.*” (emphasis added)). This timing is critical because neither the MRGAA Guidelines nor the 2003 permit could have contemplated the fact-specific impacts that the City’s future transfer applications might have on other water users or the public welfare.

The OSE erred by approving the City’s transfer applications based on its assessment of water quantity within the Middle Rio Grande, without considering the actual impacts of depleting the water flow adjacent to the Pueblo. **[3-11-25 Trial Tr. 304:19-305: [Kindel Test.]]** The OSE’s mechanical application of the MRGAA Guidelines led the agency to approve the City’s transfers based on water quantity, without adequate consideration of Sandia’s water rights or the public welfare. **[RP 7788]**

Of specific importance to this appeal, the OSE failed to consider two essential factors that are relevant to the impairment and public welfare analysis: (1)

Sandia's non-consumptive beneficial use of water adjacent to the Pueblo for cultural and traditional purposes; and (2) the reduction in water quality caused by return flow from the City's wastewater effluent. [3-11-25 Trial Tr. 304:20-25 (Kindel Test.); RP 7787]

**B. The District Court Properly Conducted De Novo Proceedings.**

As explained above, the OSE failed to consider the specific facts of the proposed transfers and their potential to adversely impact Sandia's water rights or public welfare, as required by Section 72-5-23. De novo review by the district court is in place for this very reason, and the district court properly conducted de novo proceedings in this case.

Appeals of decisions of the OSE under NMSA 1978, § 72-7-1 differ from other administrative appeals in New Mexico. Under Section 72-7-1, the district court conducts de novo proceedings "as cases originally docketed in the district court." N.M. Const. Art. XVI, § 5. This standard permits the district court to consider both evidence presented to the OSE and additional evidence not before the agency. *See* NMSA 1978, § 72-7-1(E) ("The proceeding upon appeal shall be de novo as cases originally docketed in the district court. Evidence taken in a hearing before the state engineer may be considered as original evidence subject to legal objection, the same as if the evidence was originally offered in the district court."); *Lion's Gate Water*, 2009-NMSC-057, ¶ 22 ("[N]o limitations have been

placed by law upon the power of our district courts in these appeals to find facts, make conclusions of law and enter such judgments, orders and decrees as are proper to dispose of the issues.” (citation omitted)).

In *Lion’s Gate*, the Supreme Court clarified that a district court’s de novo proceedings under Section 72-7-1 must be limited to the issues considered by the OSE. *Id.* This appellate structure permits the district court to benefit from the OSE’s specialized expertise in administering water rights and priorities while also considering additional facts and evidence, including information that may fall outside the scope of the OSE’s direct expertise, such as water quality considerations or water rights arising under federal law.

In this case, the issue before the OSE was whether the City’s transfer applications should be approved under Sections 72-5-23 and -24. In considering this issue, the OSE failed to consider specific factors relevant to evaluating impairment of rights and public welfare. **[RP 7787]** The OSE declined to consider Sandia’s instream beneficial use, even though it is established in New Mexico that such uses must be considered by the OSE when evaluating a transfer application. *See Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth.*, 2014-NMCA-032, ¶ 28, 320 P.3d 492. And the OSE failed to consider water quality impacts, even though both the OSE and the courts have considered water quality in previous cases. *See Heine v. Reynolds*, 1962-NMSC-002, ¶ 9, 69 N.M. 398, 367 P.2d 708

(upholding the district court’s denial of an application on the ground that increased pumping would gradually increase salt content in the Roswell Artesian Basin, thereby impairing water quality and existing rights).

The district court exercised appropriate appellate review under the applicable legal framework by considering the issue considered by the OSE, while allowing additional evidence relevant to the statutory criteria. NMSA 1978, § 72-7-1(E). The district court properly reversed the OSE because the City failed to show the transfers would not impair the Pueblo’s time immemorial water rights involving instream uses of the Rio Grande, and because the City failed to show that the transfers would not be a detriment to public welfare. [RP 7795-7796]

**C. This Court Should Apply the Section 72-5-23 Criteria De Novo, as a Matter of Law, to the Factual Circumstances and Evidence in this Case.**

On appeal, the Court of Appeals applies the statutory impairment and public welfare criteria de novo, as a matter of law, to the unique factual circumstances and information presented to the district court. The Court of Appeals reviews the district court’s conclusions of law and related questions of statutory interpretation de novo. *Lion’s Gate Water*, 2009-NMSC-057, ¶ 18. The Court of Appeals reviews the district court’s findings of fact for substantial evidence. *State ex rel. Off. of State Eng’r v. Intrepid Potash, Inc.*, 2025-NMSC-040, ¶ 16, 580 P.3d 130. In doing so, “[a]ppellate courts operate under a presumption of correctness of the district

court's rulings.” *Aquifer Sci., LLC v. Verhines*, 2023-NMCA-020, ¶ 36, 527 P.3d 667.

**1. Water Belongs to the Public, and Section 72-5-23 Must Be Applied in a Manner that Effectuates Legislative Intent to Promote Public Values.**

As a threshold matter, this Court should interpret the Section 72-5-23 criteria through a lens that considers New Mexico’s long history of stewarding water resources as a public value.<sup>3</sup> Under the New Mexico Constitution, the natural waters of New Mexico “belong to the public.” N.M. Const. Art. XVI, § 2. This bedrock principle has been an integral part of our law, history, and custom for hundreds of years, since long before New Mexico became a territory. *See Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 2022-NMSC-020, ¶ 13, 519 P.3d 46. When the New Mexico Constitution was ratified, it recognized and protected existing water rights while confirming the public nature of New Mexico’s water resources. *See* N.M. Const. Art. XVI, § 1 (“All existing rights to

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<sup>3</sup> New Mexico’s 50 Year Water Action Plan’s opening statement from Governor Michelle Lujan Grisham reads: “There are few places in the world where water holds such profound significance as here in New Mexico. The original inhabitants of the southwest have recognized the life-sustaining import of water for thousands of years. Today, it also holds immeasurable cultural, agricultural, ecological, economic, and recreational value.” Office of the Governor Michelle Lujan Grisham, 50 Year Water Action Plan, p. i (2024), *available at* <https://www.nm.gov/wp-content/uploads/2024/01/New-Mexico-50-Year-WaterAction-Plan.pdf>.

the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.”); N.M. Const. Art. XVI, § 2 (“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public[.]”); *see also* NMSA 1978, § 72-1-1 (“All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.”).

Under New Mexico law, individuals may exercise a usufructuary right to apply New Mexico’s public waters to beneficial use, but “individuals have no ownership interest” in the waters, and applications for water appropriations and transfers remain public and subject to “the laws of the state.” *Adobe Whitewater Club of N.M.*, 2022-NMSC-020, ¶ 24 (quoting N.M. Const. Art. XVI, § 2).

In addition to public ownership, the bedrock principles of beneficial use and prior appropriation provide the foundation for the administration of water rights in New Mexico. The New Mexico Constitution provides that “[b]eneficial use shall be the basis, the measure and the limit of the right to use water.” N.M. Const. Art. XVI, § 3. As our Supreme Court recently explained, “because the water of any natural stream, perennial or torrential, not appropriated prior to statehood belongs to the public and is subject to appropriation for beneficial use, a water right is not the right to own water, but to use it beneficially.” *Intrepid Potash*, 2025-NMSC-

040, ¶ 1 (quotation marks and citation omitted). A use is beneficial if it is “necessary for some useful and beneficial purpose.” *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 29, 62 N.M. 264, 308 P.2d 983. No use of the natural waters of the state may be recognized and sustained without naming and demonstrating a beneficial use. *Id.*; see NMSA 1978, § 72-1-2 (1907). The doctrine of beneficial use applies to both consumptive and non-consumptive water uses. *Carangelo*, 2014-NMCA-032, ¶ 40 (holding that “a non-consumptive, beneficial use can be the basis for an appropriation of water as much as a consumptive one”).

As noted above, the New Mexico Constitution protects existing water uses through priority administration. N.M. Const. Art. XVI, § 2 (“Priority of appropriation shall give the better right.”); § 72-1-2 (“Priority in time shall give the better right.”). Under this doctrine, “[t]he appropriation of water for beneficial use establishes the priority date of a water right in relation to other water rights, and the full right of an earlier appropriator will be protected, to the extent of that appropriator's use, against a later appropriator.” *State of N.M. ex rel. State Eng'r v. Comm'r of Pub. Lands*, 2009-NMCA-004, ¶ 15, 145 N.M. 433, 200 P.3d 86.

The prior appropriation doctrine gives Pueblo water rights that have been in use from time immemorial priority over later uses. See § 72-1-2; see, e.g., *U.S. v. Abousleman*, \_\_\_ F. Supp. 3d \_\_\_, 2025 WL 3687974, at \*8 (D.N.M. Dec. 19, 2025) (concluding in the context of an adjudication that a pueblo’s time

immemorial water rights carry a priority date of February 2, 1814, the date of the Treaty of Guadalupe Hidalgo). Federal law establishes and recognizes the water rights of Pueblos as sovereign nations, including the recognition of aboriginal water rights arising from time immemorial. *See Abousleman*, 2025 WL 3687974, at \*7-8 (acknowledging that Sandia and other Pueblos “possess aboriginal water rights”); *see also U.S. v. Winans*, 198 U.S. 371, 384 (1905). Like other water rights, aboriginal water rights do not need to be adjudicated to receive priority administration under New Mexico law. *See* NMSA 1978, § 72-2-9.1 (2003) (directing the state engineer to implement priority administration prior to formal adjudication of water rights because “the adjudication process is slow” and “the need for water administration is urgent”).

The importance of beneficial use and priority administration notwithstanding, New Mexico has an extensive history of uplifting public welfare values in the administration of water rights appropriations, transfers, and leasing. In 1907, New Mexico’s Territorial Legislature enacted a water code that required consideration of the public interest for new appropriations, along with determinations of unappropriated water, non-impairment, and beneficial use. 1907 N.M. Laws, ch. 49, § 28.<sup>4</sup> Prior to 1985, New Mexico law authorized the OSE to

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<sup>4</sup> *See* Consuelo Bokum, *Implementing the Public Welfare Requirement in New Mexico’s Water Code*, 36 Nat. Resources J. 681, 682 (1996).

reject an application for a new appropriation of surface water if the appropriation would be “contrary to the public interest.” NMSA 1978, § 72-5-7 (1907, prior to 1985 amendment).

Later, in 1985, the Legislature amended several statutes within the water code to authorize the OSE to deny an application if approval “would be contrary to the conservation of water within the state or detrimental to the public welfare of the state.” These provisions were added to multiple statutes, including the appropriation statute, § 72-5-7, and the transfer statute at issue in this case, § 72-5-23. The Legislature adopted the amendment to Section 72-5-23 in the wake of a federal court decision that upheld an interstate transfer of water rights to Texas, which evidenced the need for New Mexico to require a public welfare determination for transfers of water rights, as well as appropriations. *See City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).

Given New Mexico’s history of treating water as a public resource and ensuring that our legal framework promotes the public welfare, New Mexico’s courts must ensure that water rights are administered in a way that upholds these values. We presume that the Legislature was aware of New Mexico’s existing body of water law when the Legislature added the public welfare criterion to Section 72-5-23 and that the Legislature intended the public welfare analysis to have independent meaning, outside the existing concepts of public ownership, beneficial

use, and prior appropriation. *See Autovest, L.L.C. v. Agosto*, 2025-NMSC-001, ¶ 22, 563 P.3d 811 (“We presume the Legislature is aware of existing law when it enacts legislation” and that “the Legislature would have taken that law into consideration when enacting new law.”)

**2. New Mexico Statutes Are Silent on the Definition of Public Welfare, and the OSE Has Applied the Criterion Narrowly.**

Although the public welfare criterion was added to our statutes over forty years ago, our statutes do not define “public welfare,” and no regulation or robust agency guidance has been promulgated by the OSE. To date, it appears the OSE has primarily considered one factor in its evaluation of whether a transfer is detrimental to public welfare: whether there is sufficient water quantity for New Mexico to comply with its interstate compact obligations. *Carangelo*, 2014-NMCA-032, ¶ 78 (affirming the OSE’s determination that a depletion in Rio Grande flow that would adversely impact compliance with the Rio Grande Compact compliance would be detrimental to public welfare). Environmental *Amici* agree that compact compliance is a matter of significant importance to the public welfare of the state, but this is just one factor relevant to the public welfare analysis. Many additional factors, including cultural and environmental values, warrant consideration by the courts, based on the evidence and facts presented.

**3. New Mexico Courts Apply the Section 72-5-23 Criteria on a Case-by-Case Basis.**

New Mexico courts have a long history of implementing Section 72-5-23 and effectuating legislative intent by considering the transfer criteria on a case-by-case basis. The Court should apply the existing analysis framework to the public welfare criterion in this case.

Regarding the first criterion, to evaluate whether approving an application would be detrimental to existing water rights, New Mexico courts have long understood the need to conduct an impairment analysis on a case-by-case basis and to consider the relevant facts of each case. *See Mathers v. Texaco Inc.*, 1966-NMSC-226, ¶ 16, 77 N.M. 239, 421 P.2d 771 (holding that “the question of impairment of existing rights is one which must generally be decided upon the facts in each case”); *see also Montgomery*, 2007-NMSC-002, ¶ 24 (“[T]he individual facts of each case may require different resolutions of impairment questions.”).

This Court recently followed the same approach in a case implicating the second criterion, “conservation of water.” In *Aquifer Science*, 2023-NMCA-020, ¶ 44, this Court noted that no previous New Mexico cases had discussed the conservation criterion. The Court wrestled with the definition of conservation and observed that conservation should be given a broad definition that includes “not just minimal use and prevention of waste, but broader concerns for planned

management and *caring for resources to prevent exploitation, destruction and depletion*. These broader concerns would be obvious additions to any definition of conservation as applied to water in New Mexico.” *Id.* ¶¶ 39-40 (emphasis added). This Court declined to offer a “bright line test” for the conservation of water and observed that a bright-line approach might lead to “severe complications.” *Id.* ¶ 44.

Regarding the third criterion, public welfare, there is a need for New Mexico courts to further clarify the framework for evaluating public welfare and to identify the factors and evidence that may be relevant to this analysis. In doing so, the courts should follow the *Aquifer Science* approach, by applying the public welfare criterion broadly to the facts of each case and considering the relevant public values. As one commentator observed, considerations of what is detrimental to public welfare have evolved over time as the public has realized the critical value of our water resources, beyond mere economic development potential. “Many New Mexicans now give significant importance to social and environmental values related to water use, such as water quality, ecological protection, and preservations of cultures and traditional cultures.”<sup>5</sup>

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<sup>5</sup> Bokum, *supra* at 683. Ms. Bokum references the Committee of Western Water Management, National Research Council, *Water Transfers in the West: Efficiency, Equity, and the Environment* 163 (1992): “All water management activities, from permit applications to adjudications, are more suspect than they are in other states because they threaten the complex and fragile web of communal uses [acequias or communal ditch systems] or threaten to deprive Indians or Hispanics of control over their future.”

The plain language of the public welfare criterion, New Mexico's history of promoting water as a public resource, and case law support a broad approach to public welfare determinations. Public values that fall under the public welfare umbrella include the need to meet essential human needs for current and future users, to promote health and safety, to maintain minimum instream flows or lake levels, to protect cultural and traditional uses, to maintain ecological health and fish and wildlife populations, to provide recreational opportunities, and to protect water quality. *See City of El Paso By & Through Pub. Serv. Bd. v. Reynolds*, 597 F. Supp. 694, 700 (D.N.M. 1984) (“‘Public welfare’ is a broad term including health and safety, recreational, aesthetic, environmental and economic interests.”).

Public welfare provisions and the case law of other states robustly support the consideration of all relevant public and communal values. *See, e.g., Shokal v. Dunn*, 109 Idaho 330, 337–38, 707 P.2d 441, 448–49 (1985) (stating that the Idaho legislature declared it “in the public interest” that “the streams of th[e] state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.”); *Tulkisarmute Native Cmty. v. Heinze*, 898 P.2d 935, 951-52 (Alaska 1995) (holding that that an Alaska agency acted outside its authority when it granted water rights permits for a mining project without considering concerns

raised by the Tulkisarmute Native Community Council about impacts to fish and wildlife resources relied upon for sustenance by the native community).

As our water supplies decrease and the pressure on our limited water resources increase, New Mexico's public welfare criterion can and must serve as a critical check on our water rights administration to ensure the lawful and equitable administration of our shared public resource. New Mexico has led the way in promoting water as a public resource, and it follows that our courts should interpret our public welfare criterion broadly to benefit the common good. *See Shokal*, 109 Idaho at 338 (following the lead of New Mexico's Territorial Supreme Court to conclude that "the 'public interest' should be read broadly in order to 'secure the greatest possible benefit from [the public waters] for the public.'" (citing *Young & Norton v. Hinderlider*, 1910-NMSC-061, ¶ 21, 15 NM 666, 110 P. 1045)).

#### **4. This Court Should Affirm the District Court.**

In this case, the OSE did not consider that allowing further offsets downstream of the Pueblo served to maintain the ongoing groundwater pumping by the City, which results in the following impacts: (1) further depletion of the instream flow of the Rio Grande by the Pueblo; and (2) less dilution of the City's return wastewater effluent, which often violates water quality standards. **[RP 7786 -7787]**

The Pueblo presented evidence to the district court related to both water quality impairment [3-12-25 Tr. 480:16-482:12 [Suina Test.]] and the adverse impacts that the transfers would have on the Pueblo's instream beneficial use for religious and cultural practices. [RP 7786; 3-12-25 Tr. 478:17-482:18 [Suina Test.]] These categories of evidence were relevant to evaluating impairment of the Pueblo's water rights and the issue of whether the transfer would be detrimental to the public welfare of the state. This Court should affirm the decision below because the district court's findings of fact are supported by substantial evidence and its conclusions of law are based on a proper interpretation of the transfer statute.

**a. The District Court Properly Considered Sandia's Right to Continue its Existing Non-consumptive Beneficial Use.**

It is essential that determinations under Section 72-5-23 consider the impacts on existing beneficial uses of the affected water, including non-consumptive, instream use. Instream uses have long been acknowledged as "beneficial" uses under New Mexico law. *See, e.g., Trambley v. Luterman*, 1891-NMSC-016, ¶ 1, 6 N.M. 15, 27 P. 312 (holding that an acequia's prior non-consumptive water use was entitled to protection against a later upstream use that would deplete the stream flow); *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, ¶ 23, 51 N.M. 207, 182 P.2d 421 (concluding that "beneficial use" includes uses for recreation and fishing); *U.S. v. Ballard*, 184 F. Supp. 1 (D.N.M.

1960) (acknowledging that conservation by the state game commission is a beneficial use); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1132 (10th Cir. 2003) (explaining that using water to support fish and wildlife and to prevent jeopardy to the endangered silvery minnow is beneficial use under New Mexico law), *vacated on other grounds by* 355 F.3d 1215 (10th Cir. 2004). *See generally* N.M. Att’y Gen. Op. No. 98-01 (Mar. 27, 1998) (concluding that “New Mexico law permits the State Engineer to afford legal protection for instream flows for recreational, fish or wildlife, or ecological purposes”). Instream uses are essential to the Pueblo’s commitment to the cycle of water that supports the bosque and therefore, are a significant value to uphold for public welfare. As stated by the district court, “The Pueblo’s traditional and cultural uses also include stewardship of the river and the bosque for future generations, including the next thousand years.” [RP 7787]

Other states have recognized rights to maintain instream flows and have concluded that instream flows promote public welfare values. Oregon, for example, took an early step in listing instream flow as a public interest factor, and in 1929, Oregon adopted a statute to give due weight to “[c]onserving the highest use of the water for all purposes, including . . . public recreation, protection of commercial and game fishing and wildlife . . . or any other beneficial use to which water may be applied for which it may *have a special value to the public.*” Act of

Feb. 28, 1929, ch. 245, Sec. 1, 1929 Or. Laws 252-3 (codified as amended at Or. Rev. Stat. Sec. 837.170(8)(a) (2005) (emphasis added). Kansas lists five factors for public interest, including whether the proposed water use would deter and prejudice “[e]stablished minimum desirable streamflow requirements.” Kan. Stat. Ann. § 82a-711(b) (2004). Nebraska also includes instream flow considerations in its water rights application process by naming specific requirements for instream flow appropriations. Neb. Rev. Stat. Ann. § 46-2,116 (2025). The shift in western states to consider instream flows reflects an increasing consciousness and interest by the public to uphold the values in water beyond its economic development potential.

As established by the testimony presented to the district court, the Pueblo has federally recognized, time-immemorial aboriginal rights in the stream flow of the Rio Grande for use in proximity to the Pueblo. **[3-12-25 Trial Tr. 442:23-443:6 [Kaufman Test.]; 3-12-25 Trial Tr. 478:7-480:22 [Suina Test.]]** The Pueblo’s practices and connections constitute an existing and ongoing beneficial use with a priority date of time immemorial, which is entitled to protection. As the district court stated, “In order to support the Pueblos traditional and cultural uses, there must be both a minimum quantity and a minimum quality of water in the Rio Grande adjacent to the Pueblo: There must be a perennial stream flow sufficient to support a balanced ecosystem and water quality that is safe for human contact,

consumption and use.” [RP 7787] See *E. Valley Water Dist. v. Ore. Water Resources Comm’n*, 374 Or. 148, 174–75, 574 P.3d 453, 469 (2025) (holding that “a water right confers not just the right to a quantity of water, but also the right to continue the specified beneficial use of that water”).

**b. The District Court Properly Considered New Mexico’s Cultural and Traditional Values.**

As explained above, New Mexico courts should apply the public welfare criterion in a manner that encompasses cultural and traditional practices in applicable cases. Here, the Pueblo’s time immemorial non-consumptive rights include cultural uses of the water and the living plants and wildlife of the bosque, which are supported by the river water and riparian ecosystem. [3-12-25 Tr. 424:12- 22 [Kaufman Test.]; 3-12-25 Tr. 478:17-479:24 [Suina Test.]] The Pueblo presented evidence that its uses of the water are traditional, ceremonial, and historic, and include immersion, intentional or incidental ingestion of water, as well as protection of wildlife and riparian habitat. [3-12-25 Tr. 442:23-443:6 [Kaufman Test.]; 3-12-25 Tr. 478:7-480:22 [Suina Test.]; Ex. 48 at 16 [Pueblo’s Water Quality Standards]] The Pueblo’s river use is wholly intertwined with the Pueblo’s location next to the Rio Grande and its use of the water ceremonially and in support of the unique bosque ecosystem on Pueblo lands, which is also culturally significant to the Pueblo. [3-12-25 Tr. 424:12-22 [Kaufman Test.]; 3-12-25 Trial Tr. 478:17-479:24 [Suina Test.]]

This Court should affirm the district court’s conclusion that the Pueblo’s cultural and traditional uses are values that must be assessed in the public welfare determination. In *In re Sleeper*, a district court held that a public welfare review of the place and nature of use should include consideration of cultural values. *Sleeper v. Ensenada Land and Water Ass’n*, No. RA 84-53 (C), Decision of the Court (N.M. Dist. Ct. July 2, 1985). The district court weighed the impacts on the local culture of rural Rio Arriba County against a proposed recreational lake and resort with subdivision development. In a de novo appeal, the district court concluded that approving the proposed water rights transfers would “likely destroy a distinct local culture which is several hundred years old,” and declaring “The Northern New Mexico region possesses history, tradition and culture of recognized value, not measurable in dollars and cents. *The relationship between the people and their land and water is central to the maintenance of that culture and tradition.*” *Id.* at Findings 34, 35 and 36 (emphasis added). The district court denied the transfers as contrary to the public welfare. The Court of Appeals reversed, reasoning that the transfer statute in place at the time of the application did not yet include a public welfare provision. *In re Sleeper*, 1988-NMCA-030, ¶¶ 10-18, 107 N.M. 494, 760 P.2d 787. The Legislature’s addition of the public welfare criterion to Section 72-5-23 in 1985 puts consideration of cultural and traditional values squarely within the scope of the transfer statute. *See, e.g., G.R. Sewell Ditch v. D’Antonio*, A-1-

CA-29332, mem. op. ¶ 21, 2011 N.M. App. Unpub. LEXIS 212, \* 21 (N.M. Ct. App. May 16, 2011) (nonprecedential) (suggesting that actions that “threaten acequia culture” may be detrimental to public welfare).

As the district court properly recognized, New Mexico prides itself on our history and our state’s extraordinary blend of people and cultures. In *Anaya v. Public Service Company*, No. 71-43,347(C) (N.M. First Jud. Dist. June 22, 1990), in which the court determined ditch users with provisionally determined priority dates earlier than the utility had the better right, the district court framed public welfare values. “The interest of the public does not only comprehend economic values but *cultural, historical and aesthetic values.*” *Id.* (emphasis added). It is imperative that the OSE and the courts recognize the crucial roles that Indigenous and traditional communities play in New Mexico by protecting cultural values, instream flow, riparian watersheds, and ecosystems under our statutory framework for water management and conservation. The district court correctly found that Sandia Pueblo presented sufficient evidence to establish its right to non-consumptive beneficial use of the water adjacent to the Pueblo under federal law based on aboriginal title and that allowing impairment of those rights would be detrimental to the public welfare. **[RP 7786-7787]**

**c. Water Quality Considerations Are Relevant to Impairment and Public Welfare Determinations.**

As stated above, the 2003 permit allows the City to utilize discharged effluent from its wastewater treatment plant to offset some of its groundwater pumping. [RP 7787] Therefore, both the quantity and quality of the City's outflow discharge are relevant to consideration of whether granting the transfer applications will impair the Pueblo's water rights or cause detriment to the public welfare. [RP 7787] Given that Sandia Pueblo's instream water right is based on beneficial use for traditional and cultural practices, including immersion and consumption, the OSE erred by failing to consider evidence of water quality degradation for purposes of its analysis.<sup>6</sup>

Although the OSE declined to consider the quality of the City's effluent in this case, historically, it has been within the purview of the OSE and the courts to consider the impacts of water quality in an impairment analysis. In *Heine*, 1962-NMSC-002, the OSE considered an application to transfer the location of groundwater pumping. The OSE denied the transfer because increased salinity would impact water quality and impair existing water rights. *Id.* ¶¶ 3-4. The Court of Appeals affirmed. *Id.* ¶ 12. In doing so, the Court rejected the applicant's

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<sup>6</sup> The OSE obviously does not have jurisdiction to enforce the City's NPDES permit, which is issued by the U.S. Environmental Protection Agency, and Sandia Pueblo is not asking OSE to do so. Rather the OSE can review EPA data about the effluent status when considering impairment and public welfare factors.

contention that the water quality impacts were not substantial, explaining that the “gradual increase of the salt content of the water in the Basin, due to increased pumping, could well prove to be disastrous to the entire Basin, even though the increase of the salt content attributable to one well would be very small.” *Id.* ¶ 9 (noting that the question of impairment of existing rights is a matter which must generally depend upon each application, and to attempt to define the same would lead to severe complications).

In its de novo proceedings in this case, the district court rightly considered the quality of the effluent discharge and acknowledged that poor water quality adversely impacts the Pueblo’s specific instream uses. The district court found, “When the Rio Grande adjacent to the Pueblo is polluted, Pueblo members cannot use [the] waters for certain of their religious and cultural practices.” [RP 7788] As explained by the U.S. Supreme Court in *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507, 22 L Ed 414, 514-15 (1874),

What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant.

Other western states, such as Idaho and Washington, have specifically identified water quality as a factor—among other enumerated factors including aesthetics, recreation, and ecological support—to be analyzed when considering the public interest, and have recognized that the *use* of the water is often determinant of impairment and public welfare findings. *See, e.g., Shokal*, 109 Idaho 330 (water resources director authorized to reject an application conflicting with “public interest” elements, including water quality); *Stempel v. Dep’t of Water Res.*, 508 P.2d 166, 170 (Wash. 1973) (environmental policy act and water resources act implicitly broadened to require the Department of Water Resources to consider water pollution).

In this case, the district court correctly considered water quality in evaluating evidence of impairment to the Pueblo’s instream water rights and detriment to the public welfare. The evidence before the district court was that the City’s discharged effluent violates the water quality standards in its NPDES permit more than fifty percent of the time. **[Ex. 1 at 5-12 -5-13, Figure 5-7, Figure 5-8;3-13-25 Tr. 99:10-103:8 [Hamai Test.], 3-12-2025 Tr. 443:15-25 [Kaufman Test.]** The City can only discharge into the Rio Grande by virtue of its NPDES permit. **[Ex. 637, 638, 639]**

Under the unique factual circumstances of this case, the degraded effluent does not actually offset depletions from groundwater pumping because it is

unusable for the ceremonial uses the Pueblo has in the instream flow of the river. The quality of the water used from the river is highly relevant to both impairment and public welfare. This Court should affirm the decision of the district court.

### CONCLUSION

For the reasons stated above, Environmental *Amici* request that this Court affirm the district court's ruling and deny the City's and OSE's appeals in their entirety.

Respectfully submitted,

/s/ Ann McCartney

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I HEREBY CERTIFY that a true and correct copy of the foregoing brief was electronically served on the following on April 27, 2026:

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