IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v.

No. 32,705

SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.

COURT OF APPEALS OF NEW MEXICO
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BRIEF IN CHIEF

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

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Statement of Compliance: I certify in accordance with Rule 12-213 NMRA that this brief was prepared using a fourteen-point, proportionally spaced typeface with MicrosoftWord 2010 and that the body of the brief contains 10,774 words.

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

Appellant Augustin Plains Ranch, LLC (Augustin) submitted an application to the State Engineer for a permit to appropriate underground water. Our Supreme Court held in *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 31, 147 N.M. 523, 226 P.3d 622, that the State Engineer generally must consider the full merits of a water rights application. Here, however, the State Engineer denied Augustin's application without considering its merits and without holding an evidentiary hearing. On appeal, the district court affirmed the State Engineer's denial of the application without an evidentiary hearing. The issue presented for review is whether the district court erred in upholding the State Engineer's refusal to consider the full merits of the application.

II. SUMMARY OF FACTS STATED IN THE APPLICATION

Because the State Engineer denied Augustin's application without affording the parties an opportunity to develop or present evidence, the facts are limited to those stated in Augustin's application for a permit to appropriate underground water, as amended and modified (the Application). The Application sets out the following facts addressing the requirements of NMSA 1978, Section 72-12-3 (2001):

(1) The Application proposed to appropriate water through wells of a projected total depth not to exceed 3000 feet below the surface of the Augustin

Plains Ranch, the location of which was identified by township, range, and quarter section within Catron County, New Mexico. [RP 68-84]; *see* § 72-12-3(A)(1).

(2) The Application identified the proposed beneficial uses of the water as domestic, livestock, irrigation, municipal, industrial, commercial, environmental, recreational, subdivision and related, replacement, and augmentation. [RP 68]; *see* § 72-12-3(A)(2).

(3) The Application identified the locations of thirty-seven proposed wells by map and by township, range, quarter section, latitude, and longitude. [RP 68, 71-75]; *see* § 72-12-3(A)(3).

(4) The Application identified Augustin itself as the owner of the land on which the proposed wells were to be located. [RP 68, 71-81]; *see* § 72-12-3(A)(4).

(5) The Application quantified the proposed diversion amount and consumptive use at 54,000 acre-feet per annum. [RP 68]; *see* § 72-12-3(A)(5).

(6) The Application identified the proposed places of use of the water as (A) the Augustin Plains Ranch, and (B) any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties situated within the geographic boundaries of the Rio Grande Basin. [RP 69, 82-84]; *see* § 72-12-3(A)(6).

(7) The Application described land to be irrigated as 4,440 acres on the Augustin Plains Ranch, specified by township, range, and quarter section, and

further identified as the 120 acres within a 1,290-foot radius of each of the 37 proposed well locations. [RP 71-84, 308, 364-65]; *see* § 72-12-3(A)(7).

III. COURSE OF PROCEEDINGS

Augustin submitted its original application for a permit to appropriate underground water to the State Engineer on October 12, 2007. [RP 126-38]. It later submitted an amended application for a permit to appropriate underground water, which it supplemented and modified with additional information provided to the State Engineer. [RP 68-84, 364-65].

Under the State Engineer's regulations, "[u]pon receipt of an acceptable application the state engineer shall prepare and issue a notice of publication and shall send it to the applicant with instructions that it be published weekly for three consecutive weeks in a newspaper of general circulation within the county in which the well is to be drilled." 19.27.1.12 NMAC; *see* § 72-12-3(D). The regulations further provide that "[b]efore acceptance by the state engineer, applications tendered must conform to the requirements of the statutes and rules and regulations of the state engineer." 19.27.1.11 NMAC; *see* § 72-12-3(C).

The State Engineer prepared and issued notices for publication of both Augustin's original application and its amended application, and the notices were published in the *Mountain Mail*, the *Silver City Press and Independent, The*

Herald, *El Defensor Chieftain*, the *Valencia County News-Bulletin*, the *Albuquerque Journal*, and the *Santa Fe New Mexican*. [RP 86-102, 140-46].

In reliance on the State Engineer's acceptance of the Application for filing and publication, Augustin took steps to develop evidence in support of its Application and expended significant sums of money and resources drilling a test hole and a production well, beginning the necessary hydrologic analysis, and preparing for an evidentiary hearing before the State Engineer. [RP 301-03].

Following the publication of notice of the Application, numerous protests were filed with the State Engineer. [RP 65, 104-24]. The State Engineer's regulations provide that "[i]n the event an application is protested, hearings shall be conducted pursuant to the provisions of Article 3 [now 19.25.4 NMAC] of these rules and regulations." 19.27.1.15 NMAC. Accordingly, a hearing examiner in the Office of the State Engineer issued an order docketing the Application for hearing and directing the parties to submit hearing fees. [RP 65-66, 165-66].

Protestant Abbe Springs Homeowners' Association and approximately 100 other protestants (collectively, Protestants) filed a motion to partially stay the hearing in order to first determine certain issues designated by Protestants, including whether the Application should be found insufficiently specific and whether it violated the prior appropriation doctrine. [RP 258-64]. The hearing examiner issued a scheduling order which invoked the State Engineer's jurisdiction

pursuant to Section 72-12-3. [RP 306-10]. The order set forth the following statement of the issues in accordance with the statutory standard in Section 72-12-3(E):

> A. Availability of water to satisfy the application.
>
> B. Whether granting the application would result in impairment to existing water rights.
>
> C. Whether granting the application would be detrimental to the public welfare of the state.
>
> D. Whether granting the application would be contrary to the conservation of water within the state.

[RP 308]; *accord* § 72-12-3(E) (prescribing same issues for deciding the merits of application to appropriate underground water). Without setting a schedule to address the issues on the merits, however, the order instead set a briefing schedule on "a preliminary matter" relating to "the facial validity of the application, specificity of the application, speculation and beneficial use of water." [RP 309]. The order deferred scheduling of any "further proceedings in the event that the application is not denied or dismissed." [*Id.*].

Protestants then filed a motion to dismiss the Application on the grounds, *inter alia*, that it was vague and unspecific, that it lacked definiteness and certainty as required by the prior appropriation doctrine, and that it sought to monopolize a water supply for speculative purposes. [PR 337-65]. According to Protestants, their motion tested the "legal sufficiency" of the Application and should be decided

under the standard applied by courts to motions to dismiss for failure to state a claim upon which relief can be granted. [RP 338]. Several other parties joined in Protestants' motion or filed their own motions to dismiss on similar grounds. [RP 367-87, 409-21, 427-34, 445-47, 450-52, 457-58, 462-71, 482-88].

Augustin opposed the motions to dismiss. [RP 521-58]. It argued, *inter alia*, that dismissal of the Application would be improper, that the merits of the Application should be considered, and that the State Engineer is statutorily required to conduct an evidentiary hearing at which Augustin is given an opportunity to present evidence in support of the Application. [*Id.*].

The State Engineer's Water Rights Division also filed a response to the motions to dismiss, in which it submitted that the Application met the statutory requirements of Section 72-12-3(A) in regard to irrigation and recommended that the State Engineer conduct a hearing on the requested irrigation appropriation, but made no recommendation on whether the remainder of the Application should proceed to a hearing. [RP 499-506].

After oral argument of counsel on the motions to dismiss, the State Engineer issued an order denying the Application and dismissing the docketed hearing. [RP 659-65]. The State Engineer made no determination of whether unappropriated water was available, whether the proposed appropriation would impair existing rights, whether it would be contrary to the conservation of water, or whether it

would be detrimental to the public welfare. [RP 660-61 ¶ 8]. Rather, he found that on the face of the Application it was reasonably doubtful that Augustin was ready, willing and able to put water to beneficial use. [RP 661-62 ¶ 19]. He found that it would be contrary to sound public policy to consider the Application because it was vague, overbroad, and lacking in specificity. [RP 662 ¶¶ 21-23]. He further determined that "[i]n keeping with NMSA section 72-5-7," the Application "should not be considered by the State Engineer." [RP 662 ¶ 24]. On that basis, and without holding an evidentiary hearing, the State Engineer denied the Application and dismissed the docketed hearing. [RP 662-63]. Augustin filed a timely notice of appeal de novo to the district court from the State Engineer's order denying the Application. [RP 1-33]; *see* NMSA 1978, § 72-7-1 (1971) (providing aggrieved party with right of appeal to district court).

In the district court, Protestants filed a motion for summary judgment upholding the State Engineer's denial of the Application, and other parties joined in the motion. [RP 684-85, 713-16, 768-70]. Protestants argued, as they had before the State Engineer, *inter alia*, that the Application was vague, that it was not definite and certain as required by the prior appropriation doctrine, and that it sought to monopolize a water supply for speculative purposes. [RP 686-710, 737-65].

In a response to Protestants' motion, the State Engineer argued that he had properly determined that the Application "'should not be considered by the State Engineer' pursuant to NMSA 1978, § 72-5-7," and that the Application should be denied because considering it would be "contrary to sound public policy" and because it was too vague and overbroad to be considered. [RP 724-25] (quoting Order Denying Application ¶¶ 21-25 [RP 7]).

Augustin opposed Protestants' motion for summary judgment. [RP 778-813]. It argued, *inter alia*, that the governing statutory law as well as fundamental principles of fairness entitled it to be heard on the merits, and that the State Engineer did not have authority to deny the Application without holding an evidentiary hearing. [RP 790-811]. In regard to the State Engineer's determination in reliance on Section 72-5-7 that the Application "should not be considered" [RP 662 ¶ 24], Augustin pointed out that Section 72-5-7 does not apply in underground water proceedings, and that the governing statute, Section 72-12-3, does not give the State Engineer authority to "refuse to consider" an application. [RP 799-800]; *compare* NMSA 1978, § 72-12-3, *with* NMSA 1978, § 72-5-7 (1985). Rather, Augustin argued, the State Engineer was required to "'consider the full merits'" of the Application. [RP 803] (quoting *Lion's Gate Water*, 2009-NMSC-057, ¶ 31).

IV. DISPOSITION IN THE COURT BELOW

After oral argument of counsel, the district court issued a memorandum decision on Protestants' motion for summary judgment. [RP 872-903]. The court recognized that "[t]he sole issue on appeal is whether the State Engineer was justified in denying [the Application] without holding an evidentiary hearing." [RP 872].

The court rejected the State Engineer's contention that Section 72-5-7 authorized him to "refuse to consider" the Application, as that statute applies only to applications to appropriate surface water and not to underground water applications such as Augustin's. [RP 883-84]. The court determined, however, that the governing underground water statute, Section 72-12-3(F), "provides the statutory authority for the State Engineer to deny an application without a hearing." [RP 883].

Acknowledging that "Section 72-12-3(F) does not explain under what circumstances the State Engineer may deny an application," the district court inferred that the State Engineer must deny an application without a hearing—i.e., the State Engineer must "reject the application"—if he or she determines that the application is "facially invalid, that is, that on its face the application violates New Mexico law." [RP 884]. The court concluded that Augustin's Application was facially invalid in two respects. First, it ruled that the Application was

insufficiently specific in stating the beneficial use or uses to which the water would be applied and the place or places of use. [RP 886-97]. Second, it ruled that the Application contradicted the principles of beneficial use and public ownership of water in that, if the Application was approved, Augustin could divert water without applying it to beneficial use. [RP 897-903].

The district court directed the State Engineer's counsel to prepare an order reflecting its decision. [RP 903]. It subsequently entered a final order granting the motion for summary judgment for the reasons stated in its memorandum decision, and affirming the State Engineer's denial of the Application. [RP 904-06]. Augustin filed a timely notice of appeal to this Court pursuant to NMSA 1978, § 72-7-3 (1923). [RP 907-46]; *see Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2011-NMCA-014, ¶ 14, 149 N.M. 386, 249 P.3d 924 (recognizing that party aggrieved by district court's decision on appeal from State Engineer's order has right of appeal to this Court).

ARGUMENT

THE DISTRICT COURT ERRED IN UPHOLDING THE STATE ENGINEER'S DENIAL OF THE APPLICATION WITHOUT AN EVIDENTIARY HEARING

A. Summary of the Argument

The right to an evidentiary hearing is an essential procedural protection in proceedings before the State Engineer. Its purpose is to ensure that water rights

applicants and other parties are afforded due process. Our Supreme Court has recognized that the State Engineer must consider the full merits of any application, subject to a single statutorily mandated exception when an initial determination is made that no unappropriated water is available to an applicant seeking to appropriate surface water. Otherwise, the State Engineer is without authority to "partition" a proceeding and litigate particular issues in isolation. *Lion's Gate Water*, 2009-NMSC-057, ¶ 31.

In the present case the State Engineer did exactly what the Supreme Court in *Lion's Gate Water* cautioned him not to do. The State Engineer undertook his review of the Application by designating certain "preliminary" issues to be decided, including whether the Application was insufficiently specific and whether Augustin had an improper speculative intent. The State Engineer entertained written briefing on these preliminary issues and granted motions to dismiss the Application based on his resolution of the preliminary issues. The State Engineer never considered the merits of the Application. Over Augustin's repeated requests for a hearing, the State Engineer dismissed the hearing docket without holding an evidentiary hearing.

The State Engineer erred in refusing to consider the merits of the Application and in denying the Application without an evidentiary hearing. The district court on appeal likewise erred in upholding the State Engineer's denial of

the Application. The district court incorrectly assumed that the State Engineer had authority to refuse to consider the merits of the Application and to decline to hold an evidentiary hearing. The court further erred in determining that the State Engineer's resolution of the preliminary issues supported his denial of the Application without an evidentiary hearing.

The district court's decision and order upholding the State Engineer's denial of the Application should be reversed. This case should be remanded to the State Engineer with directions to conduct the evidentiary hearing to which Augustin is entitled on the merits of its Application.

B. Standard of Review and Preservation of Error

The Court's "analysis is one of statutory construction, which is an issue of law; accordingly, [the Court] review[s] the district court's findings and order de novo." *Lion's Gate Water*, 2009-NMSC-057, ¶ 18.

Augustin preserved its claim of error by arguing that it was entitled to a hearing giving it an opportunity to present evidence in support of the Application and that the State Engineer was required to consider the full merits of the Application. Augustin made these arguments in its written response to the motions to dismiss before the State Engineer, in oral argument before the State Engineer, in its written response to the motion for summary judgment in the district court, and

in oral argument before the district court. [RP 521-58; CD, 2-7-12, 10:39:01 - 10:55:09; RP 778-813; Tr. 17-28, 35-49, 54-55].

C. Overview of Pertinent Water Code Provisions

1. Governing principles of statutory construction

The Office of the State Engineer was required to grant Augustin the process mandated by statute because "[a]gencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes." *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 13, 289 P.3d 1232 (citation and internal quotation marks omitted).

To determine the process to which Augustin was entitled under the governing statutes, the Court applies familiar principles of statutory interpretation. The Court seeks "to give effect to the Legislature's intent," and to discern that intent it "look[s] to the language used and consider[s] the statute's history and background as well as the plain meaning of the language." *Lion's Gate Water*, 2009-NMSC-057, ¶ 23 (citations and internal quotation marks omitted). When a statute is clear and unambiguous, the Court interprets it as written. *Id.* "If, however, the statute's language is ambiguous, [the Court] must interpret the statute and determine legislative intent." *Id.* "The primary indicator of the Legislature's intent is the plain language of the statute." *Id.* "Statutes are enacted as a whole, and consequently each section or part should be construed in connection with every

other part or section, giving effect to each, and each provision is to be reconciled in a manner that is consistent and sensible so as to produce a harmonious whole." *Id.* (citation and internal quotation marks omitted). "If the result of adopting a strict construction of the statutory language would be absurd or unreasonable, then [the Court] interpret[s] the statute according to its obvious spirit or reason." *Id.* (citations and internal quotation marks omitted).

2. The requirement of an evidentiary hearing in the State Engineer's proceedings

Our Supreme Court has articulated the general purpose of the Water Code's grant of authority to the State Engineer to review water rights applications:

> The general purpose of the water code's grant of broad powers to the State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process that *maximizes resources through its efficiency, while seeking to protect the rights and interests of water rights applicants.*

Lion's Gate Water, 2009-NMSC-057, ¶ 24 (emphasis added, citations omitted). The State Engineer's charge under the Water Code, then, is to conduct a process for review of water rights applications that is both efficient and protective of "the rights and interests of water rights applicants." *Id.*

An integral part of that process, which is vital to the rights and interests of applicants, is the evidentiary hearing mandated by statute. The hearing requirement is set forth in Article 2, which addresses the general powers and duties of the State

Engineer. NMSA 1978, § 72-2-16 (1973), § 72-2-17 (1965). Section 72-2-16 plainly requires the State Engineer to conduct an evidentiary hearing either (1) before entering a decision or (2) upon timely request of a person aggrieved by the decision:

> The state engineer may order that a hearing be held before he enters a decision, acts or refuses to act. If, without holding a hearing, the state engineer enters a decision, acts or refuses to act, any person aggrieved by the decision, act or refusal to act, is entitled to a hearing, if a request for a hearing is made in writing within thirty days after receipt by certified mail of notice of the decision, act or refusal to act.

§ 72-2-16. As this Court has observed, the plain language of Section 72-2-16 "guarantees an aggrieved party one hearing." *Derringer v. Turney*, 2001-NMCA-075, ¶ 13, 131 N.M. 40, 33 P.3d 40. The State Engineer has acknowledged by regulation the mandatory right of any aggrieved party to a hearing:

> Hearings before the state engineer *will be held* when an application has been duly protested by one or more persons; upon written request of the applicant when an unprotested application has been denied by the state engineer without hearing; and *upon written request by any person aggrieved by any action or refusal to act by the state engineer.*

19.25.4.8 NMAC (emphasis added).

An aggrieved party's guaranteed right to a hearing is an essential means not only "to protect the rights and interests of water rights applicants," *Lion's Gate Water*, 2009-NMSC-057, ¶ 24, but more particularly to afford an applicant due process: "*By guaranteeing an aggrieved party one hearing*, the statute permits the state engineer to forego a pre-decision hearing, perhaps for reasons of judicial

economy, and still *comply with due process*." *Derringer*, 2001-NMCA-075, ¶ 13 (emphasis added). As this Court has reiterated, "[T]he right to a hearing granted by Section 72-2-16 is a procedural right that is 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 (emphasis added).

If Section 72-2-16 were read in isolation, it might be questioned whether the requisite "hearing" must consist of a trial-type evidentiary hearing at which an applicant has the opportunity to present evidence, or whether some lesser degree of process might be appropriate. *See, e.g.*, Henry J. Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267 (1975) (commenting that nature of hearing demanded by constitutional due process requirement may vary with context). Section 72-2-16 should not be read in isolation, however, but in connection and in harmony with other provisions of the Water Code. *Lion's Gate Water*, 2009-NMSC-057, ¶ 23. In particular, it should be read harmoniously with the very next section, Section 72-2-17, which defines the process to be afforded "[i]n the conduct of the hearing." § 72-2-17(B); *see D'Antonio*, 2008-NMCA-139, ¶ 9 (citing Section 72-2-17 as the authority for the "appropriate degree of process" that must be afforded); *Derringer*, 2001-NMCA-075, ¶ 15 (similar).

First and foremost, "opportunity shall be afforded all parties to appear and *present evidence* and argument *on all issues involved*." § 72-2-17(B)(1) (emphasis added). Parties are also entitled to be represented by counsel, to "conduct cross-examinations required for a full and true disclosure of the facts," to have notice taken of judicially cognizable or technical or scientific facts, to a record of all oral proceedings, and to have facts decided based exclusively "on the evidence and on matters officially noticed." §§ 72-2-17(B)(3) - (6).

This Court has rejected the contention that the Section 72-2-16's hearing requirement "can be satisfied solely by the written pleadings of the parties." *Derringer*, 2001-NMCA-075, ¶ 15. The Court has noted that Section 72-2-17(B) "sets forth the requirements for the conduct of hearings before the state engineer," and has explained that "although Section 72-2-17(B)(1) allows for part of the evidence to be received in written form to expedite the hearing, it states that the parties shall be afforded an opportunity 'to appear and present evidence and argument on all issues involved.'" *Derringer*, 2001-NMCA-075, ¶ 15 (quoting § 72-2-17(B)(1)). It follows that "written motions and responses do not satisfy the requirements clearly set forth in the statute." *Id.*

3. The hearing requirement in surface water proceedings

Other sections of the Water Code also bear on the State Engineer's duty to conduct an evidentiary hearing in reviewing a water rights application. Article 5,

relating to surface water, generally requires the State Engineer to conduct a hearing on an application to appropriate surface water. NMSA 1978, § 72-5-6 (1985); *see Lion's Gate Water*, 2009-NMSC-057, ¶ 32 (recognizing that State Engineer must conduct "a Section 72-5-6 hearing" and consider application on its merits upon determining that unappropriated water is available). Article 5 prescribes a specific order, however, in which the issues pertinent to a surface water application must be addressed. The State Engineer must determine first "whether there is unappropriated water available for the benefit of the applicant." § 72-5-6. If the State Engineer determines that no unappropriated water is available, he or she must reject the application: "If, in the opinion of the state engineer, there is no unappropriated water available, he *shall* reject such application." § 72-5-7 (emphasis added); *see Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135 ("It is widely accepted that when construing statutes, "shall" indicates that the provision is mandatory . . . .").

Our Supreme Court has read the general hearing requirement in Section 72-2-16 together with the mandatory duty to reject an application under Section 72-5-7 when no unappropriated water is available, and has concluded that the State Engineer loses jurisdiction to consider an application on the merits when the mandatory duty to reject the application is triggered:

> The Legislature, in creating an efficient and effective administrative process for water rights applications, recognized the dispositive nature

> of this threshold issue when it crafted New Mexico's water code and mandated in Section 72-5-7 that the State Engineer "shall" summarily reject water rights applications upon a determination that water is unavailable for appropriation. . . .
>
> If the State Engineer makes a pre-hearing determination that water is unavailable for appropriation, secondary issues that must otherwise be considered before a permit to appropriate water can be granted become irrelevant, because the State Engineer is *required* to reject the application without reaching those issues.

Lion's Gate Water, 2009-NMSC-057, ¶¶ 25-26 (Supreme Court's emphasis) (citing § 72-5-7). The Court explained that the statutory requirement to reject an application is "clear and logical" because a determination that no unappropriated water is available necessarily entails a ruling against the applicant on all issues:

> From a determination that water is unavailable for appropriation follows the inevitable conclusion that any appropriation of water under these circumstances would be contrary to the conservation of water and detrimental to public welfare and prior water rights.

Id. ¶ 27.

Most significantly for present purposes, however, upon a determination that unappropriated water *is* available, the State Engineer must proceed to conduct a Section 72-5-6 hearing and to consider the full merits of the application, including whether the proposed appropriation is contrary to the conservation of water and whether it is detrimental to the public welfare. *Lion's Gate Water*, 2009-NMSC-057, ¶ 32; *see* § 72-5-6. The Supreme Court has specifically rejected the contention that the State Engineer may "partition" a proceeding and litigate particular issues in isolation, for to do so would frustrate the Legislature's intent to establish an

administrative process promoting efficiency while protecting the rights of applicants:

> *We acknowledge the potential problem if every issue relevant to a water rights application could be partitioned by the State Engineer and litigated in isolation.* Indeed, such a process, if put into practice, would completely defeat the purpose of creating an administrative agency to efficiently handle the complex and esoteric process of water rights applications. We do not find that this is the Legislature's intent, nor is it what the water code provides.

Lion's Gate Water, 2009-NMSC-057, ¶ 31 (emphasis added).

Thus, the Supreme Court has recognized that, with the sole exception of the initial determination of whether unappropriated water is available, the State Engineer "must consider the full merits" of the application:

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

Id. (emphasis added).

4. The hearing requirement in underground water proceedings

Whereas Article 5 governs applications to appropriate *surface water*, the State Engineer's review of an application to appropriate *underground water* is governed by Section 72-12-3 of Article 12. Section 72-12-3 prescribes the information to be provided in an underground water application. §§ 72-12-3(A),

(B). Significantly, it also prohibits the State Engineer from accepting an application that fails to provide the requisite information: "No application shall be accepted by the state engineer unless it is accompanied by all the information required by Subsections A and B of this section." § 72-12-3(C). The State Engineer has acknowledged this prohibition in his own regulation. 19.27.1.11 NMAC ("Before acceptance by the state engineer, applications tendered must conform to the requirements of the statutes and rules and regulations of the state engineer. . . . Applications which are defective as to form or fail to comply with the rules and regulations shall be returned promptly to the applicant with a statement of the changes required."). Finally, once an application is accepted for filing, the State Engineer has a duty to cause notice of the application to be published. § 72-12-3(D).

After notice is published, the State Engineer must consider the application on its merits. §§ 72-12-3(E), (F). If no timely protests are filed, the application may be granted if the State Engineer determines that (1) unappropriated waters are available or the proposed appropriation would not impair existing rights from the source, (2) the proposed appropriation is not contrary to conservation of water within the state, and (3) the proposed appropriation is not detrimental to the public welfare of the state. § 72-12-3(E). If timely protests are filed, or if the State Engineer believes that a permit should not be issued, the State Engineer has

discretion either to conduct an evidentiary hearing on the application or to deny the application without holding a pre-decision hearing. § 72-12-3(F) (providing that State Engineer "may deny the application without a hearing or, before he acts on the application, may order that a hearing be held").

The language of Section 72-12-3(F) authorizing the State Engineer to "deny the application without a hearing" should not be read to divest the applicant of the general right to an evidentiary hearing that Section 72-2-16 guarantees to aggrieved persons in the State Engineer's proceedings. *Compare* § 72-12-3(F), *with* § 72-2-16. Rather, Section 72-12-3(F) and 72-2-16 should be read in connection and in harmony with each other. *See Lion's Gate Water*, 2009-NMSC-057, ¶ 25 (reading Section 72-5-7 together and harmoniously with Section 72-2-16). Section 72-2-16 allows the State Engineer to enter a decision "without holding a hearing," but it entitles any person aggrieved by the decision to a post-decision hearing upon a timely written request. § 72-2-16; *see Derringer*, 2001-NMCA-075, ¶ 13 ("[W]e hold that the state engineer was required by the clear language of [Section 72-2-16] to grant [the applicant's] request for a post-decision hearing because no pre-decision hearing had been held.").

Section 72-12-3(F) confirms the State Engineer's authority to deny an application without holding a pre-decision hearing, but it does not negate Section 72-2-16's guarantee of a post-decision hearing upon timely request of an aggrieved

party. Indeed, as noted previously, the very purpose of the guarantee of an evidentiary hearing is to ensure that the State Engineer affords the applicant due process. *D'Antonio*, 2008-NMCA-139, ¶ 9; *Derringer*, 2001-NMCA-075, ¶ 13. To read the Water Code as taking away with one hand (Section 72-12-3(F)) a constitutionally based right that it extends with the other (Section 72-2-16) would raise substantial doubts about the constitutionality of the State Engineer's procedural process. It is settled, however, that the Court should "avoid an interpretation of a statute that would raise constitutional concerns." *Chatterjee v. King*, 2012-NMSC-019, ¶ 18, 280 P.3d 283 ("It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions.") (citation and internal quotation marks omitted).

In summary, once the State Engineer accepts an underground water application for filing and publication, he or she must consider the full merits of the application. §§ 72-12-3(C), (D), (E). The State Engineer must hold an evidentiary hearing either before denying the application or upon timely request of an aggrieved party when no pre-decision hearing has been held. §§ 72-12-3(F), 72-2-16.

5. The State Engineer cannot summarily reject an underground water application that has been accepted for filing and publication

The language of Section 72-12-3, governing underground water, is conspicuously different from that of Section 72-5-7, governing surface water. The differences in language highlight the requirement of an evidentiary hearing when the State Engineer reviews an application to appropriate underground water.

As described above, Section 72-12-3 directs the State Engineer not to accept an application for filing unless it contains all of the information required in Subsections A and B. § 72-12-3(C). Once the State Engineer accepts an application for filing and publication, however, Section 72-12-3 does not restrict the State Engineer's consideration of the application on the merits to any single issue, and it does not prescribe any set order in which the issues must be decided. Unlike Section 72-5-6, Section 72-12-3 does not direct the State Engineer to decide first whether unappropriated water is available for the applicant. *Compare* § 72-5-6, *with* § 72-12-3. Moreover, unlike Section 72-5-7, Section 72-12-3 does not direct or authorize the State Engineer to "reject" an application upon determining that no unappropriated water is available; nor does Section 72-12-3 authorize the State Engineer to "refuse to consider" the application. *Compare* § 72-5-7, *with* § 72-12-3. It follows that the State Engineer's consideration of an application under Section 72-12-3 is not "jurisdictionally limited" to any single issue because the State

Engineer is neither authorized to "summarily reject" an application that has been accepted for filing and publication nor "prohibited by statute" from conducting an evidentiary hearing on the application. *Cf. Lion's Gate Water*, 2009-NMSC-057, ¶¶ 25-27, 31. Rather, it follows from *Lion's Gate Water* that once an underground water application has been accepted for filing and publication, "the State Engineer must consider the full merits of an application." *Id.* ¶ 31.

The directive in *Lion's Gate Water* to consider the full merits of an application is hardly novel or unusual. To the contrary, it is merely an articulation of the longstanding policy throughout New Mexico law favoring adjudication of disputes on their merits. *E.g., Charter Bank v. Francoeur*, 2012-NMCA-078, ¶ 11, 287 P.3d 333 (recognizing policy that "causes should be tried upon the merits"), *cert. quashed*, 2013-NMCERT-004; *Ortiz v. Shaw*, 2008-NMCA-136, ¶ 12, 145 N.M. 58, 193 P.3d 605 (recognizing same); *DeFillippo v. Neil*, 2002-NMCA-085, ¶¶ 20, 25, 132 N.M. 529, 51 P.3d 1183 (recognizing "the preference for adjudication on the merits"); *Universal Constructors, Inc. v. Fielder*, 118 N.M. 657, 659, 884 P.2d 813, 815 (Ct. App. 1994) ("It is general policy to decide claims on the merits."); *Lopez v. Wal-Mart Stores, Inc.*, 108 N.M. 259, 262, 771 P.2d 192, 195 (Ct. App. 1989) (recognizing that causes generally "should be tried on their merits" and that "depriving parties of their day in court is a penalty that should be avoided"); *Transamerica Ins. Co. v. Sydow*, 97 N.M. 51, 54, 636 P.2d 322, 325

(Ct. App. 1981) (recognizing the established policy throughout rules of civil procedure requiring that "the rights of litigants be determined by an adjudication on the merits rather than upon the technicalities of procedure and form").

The rule of *Lion's Gate Water* is also consonant with the Colorado Supreme Court's decision in a case strikingly similar to the present one. *See Colorado v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983) (en banc), *superseded by statute on other grounds as stated in Humphrey v. Sw. Dev. Co.*, 734 P.2d 637, 640 n.2 (Colo. 1987) (en banc). That case, like this one, involved applications to appropriate underground water. The trial court dismissed the applications on the grounds that the proposed appropriations were infeasible and that the applicants requested "vast quantities of water for beneficial uses stated in the broadest terms and that, therefore, the claims were merely speculative and made for the purpose of profit." *Id.* at 1321. Notably, in ordering dismissal the trial court examined a representative application on its face, entertained legal briefs and exhibits and oral argument, and "treated the proceeding as one in the nature of a motion to dismiss or for summary judgment." *Id.* "The court did not hold an evidentiary hearing," and the applicants thus were precluded from proving the feasibility of their proposal and from presenting evidence showing "with more specificity the exact uses for the water." *Id.* The Colorado Supreme Court reversed. It held that dismissal without an evidentiary hearing "was incorrect and unfairly

places a burden on the applicant not contemplated by the statutory scheme." *Id.* It explained that dismissal without an evidentiary hearing "based on general information" on the face of the applications penalized the applicants "for following statutory application procedures." *Id.*

In addition to the case law bearing out the requirement of an evidentiary hearing, the history and background of the Water Code further highlight the centrality of the hearing requirement in proceedings before the State Engineer involving underground water. *See Lion's Gate Water*, 2009-NMSC-057, ¶ 23 (recognizing that statute's history and background may illuminate legislative intent). From that history it is clear that the statutorily mandated exception permitting the State Engineer to forego a hearing in surface water proceedings has never applied in underground water proceedings.

As originally enacted in 1907, the Water Code prescribed procedures for the territorial engineer's review of applications to acquire water rights, but the statute "dealt only with surface waters." *City of Albuquerque v. Reynolds*, 71 N.M. 428, 437, 379 P.2d 73, 79 (1962); *see* 1907 N.M. Laws ch. 49, §§ 1-73. Key provisions of Article 5, including Sections 72-5-6 and 72-5-7, were originally enacted as part of the 1907 code. 1907 N.M. Laws ch. 49, §§ 27-28. Thus, from the beginning the State Engineer has had the express power in specified circumstances to summarily

"reject" or "refuse to consider" surface water applications. *Id.* § 28 (codified as amended at NMSA 1978, § 72-5-7).

The first provisions of the Water Code to address appropriation of underground water were enacted in 1927. 1927 N.M. Laws ch. 182, §§ 1-6 (codified at NMSA 1929, §§ 151-201 - 151-205) (repealed 1931). Under those provisions, applications to appropriate underground water were governed by the same procedures as surface water applications: "All waters in this State found in underground [sources] . . . are hereby declared to be . . . subject to appropriation for beneficial uses *under the existing laws of this State relating to appropriation and beneficial use of waters from surface streams*." *Id.* § 1 (emphasis added). The 1927 enactment was struck down, however, as unconstitutional. *Yeo v. Tweedy*, 34 N.M. 611, 628-29, 286 P. 970, 977 (1929). In its stead, the Legislature enacted the underground water provisions which, as amended, now comprise Article 12, including Section 72-12-3. 1931 N.M. Laws ch. 131, § 3 (codified as amended at NMSA 1978, § 72-12-3).

Since 1931, an applicant for a permit to appropriate underground water has been entitled to an evidentiary hearing when the application is accepted for filing, notice is published, and protests are filed. 1931 N.M. Laws ch. 131, § 3 ("If [timely] objection or protest shall have been filed . . . , the State Engineer shall set a date for a hearing on the application . . . ."). The hearing requirement in current

Section 72-12-3 has been modified twice, in 1967 and 1971, in conjunction with the enactment and amendment of Section 72-2-16, providing for an evidentiary hearing either before or after the State Engineer enters a decision. 1967 N.M. Laws ch. 308, §§ 1-2; 1971 N.M. Laws ch. 134, §§ 1, 3.

In 1967, the Legislature enacted the original version of Section 72-2-16 (then compiled at Section 75-2-15), entitling an aggrieved applicant to a post-decision hearing when no pre-decision hearing was conducted, but creating an exception for proceedings on underground water applications. 1967 N.M. Laws ch. 308, § 1. The reason for the exception was that, in a simultaneous amendment of Section 72-12-3 (then compiled at Section 75-11-3), the Legislature granted an underground water applicant the right to an evidentiary hearing *in the district court before* the State Engineer could deny the application. *Id.* § 2.

In 1971, the Legislature abolished the special provision for a district court hearing, and it simultaneously restored the right to an evidentiary hearing before the State Engineer in underground water proceedings. 1971 N.M. Laws ch. 134, §§ 1, 3. Thus, Section 72-2-16 was amended to provide, as it currently does, that "[i]f, without holding a hearing, the state engineer enters a decision . . . , any person aggrieved by the decision . . . is entitled to a hearing, if a [timely] request for a hearing is made in writing . . . ." 1971 N.M. Laws ch. 134, § 1; *see* § 72-2-16. With the elimination of the special provision for a district court hearing in

underground water proceedings, Section 72-2-16 was made applicable to all of the State Engineer's proceedings. 1971 N.M. Laws ch. 134, § 1. Simultaneously, Section 72-12-3 was amended to provide, as it currently does, that "the state engineer may deny the application without a hearing or, before he acts on the application, may order that a hearing be held." 1971 N.M. Laws ch. 134, § 3; *see* § 72-12-3(F).

This history reflects a consistent and deliberate choice by the Legislature to guarantee an evidentiary hearing to applicants in underground water proceedings, although the tribunal designated to conduct the hearing shifted briefly from the State Engineer to the district court and then back to the State Engineer. §§ 72-2-16, 72-12-3(F). In sum, whereas Section 72-5-7 authorizes the State Engineer to summarily "reject" and "refuse to consider" a surface water application upon an initial determination that no unappropriated water is available, Section 72-12-3 requires the State Engineer to consider the full merits of an underground water application in every case in which the State Engineer has accepted the application for filing and publication. *See Lion's Gate Water*, 2009-NMSC-057, ¶ 31.

D. The State Engineer Erred in Refusing to Hold an Evidentiary Hearing on the Application

1. Augustin timely invoked its right to an evidentiary hearing

The Application provides the information required by Section 72-12-3. As summarized above, Augustin provided each of the categories of information

enumerated in Subsections 72-12-3(A)(1) through 72-12-3(A)(7) by identifying: (1) the aquifer beneath the Augustin Plains Ranch as the underground source of the water it proposed to appropriate [RP 68-84]; (2) proposed beneficial uses of the water, *viz.*, domestic, livestock, irrigation, municipal, industrial, commercial, environmental, recreational, subdivision and related, replacement, and augmentation [RP 68]; (3) the locations of thirty-seven proposed wells [RP 68, 71-75]; (4) Augustin itself as the owner of the land where the proposed wells were to be located [RP 68, 71-81]; (5) 54,000 acre-feet per annum as the amount of water applied for [RP 68]; (6) the Augustin Plains Ranch and areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties within the geographic boundaries of the Rio Grande Basin as the proposed places of use of the water [RP 69, 82-84]; and (7) 4,440 designated acres of land on the Augustin Plains Ranch as land to be irrigated [RP 71-84, 308, 364-65]. (Subsection 72-12-3(B) does not apply to the Application because the applicant, Augustin, is the owner of the land where the proposed wells are to be located. [RP 68]; *see* § 72-12-3(B).)

The State Engineer undisputedly accepted the Application for filing and publication. [RP 86-102]. The State Engineer's acceptance of the Application reflects a determination that it provides all of the information required by Section 72-12-3 inasmuch as the State Engineer is prohibited by statute from accepting an

application that fails to provide the required information. § 72-12-3(C) ("No application shall be accepted by the state engineer unless it is accompanied by all the information required by Subsections A and B of this section."); *see also* 19.27.1.11 NMAC. The State Engineer's decision to cause notice of the Application to be published also reflects a determination that the Application conformed to the requirements of the statute inasmuch as the statutory duty to publish notice arises only upon acceptance of an application for filing. § 72-12-3(D) ("*Upon the filing of an application,* the state engineer shall cause to be published . . . a notice that the application has been filed . . . .") (emphasis added); *see also* 19.27.1.12 NMAC ("*Upon receipt of an acceptable application* the state engineer shall prepare and issue a notice of publication . . . .") (emphasis added).

After accepting the Application for filing and publication, the State Engineer acknowledged the issues under which the Application was to be reviewed on the merits as prescribed by Section 72-12-3(E). [RP 308]. Augustin timely notified the State Engineer that it was invoking its right to an evidentiary hearing. In its written response to motions to dismiss, it unequivocally and repeatedly demanded an evidentiary hearing. [RP 521-58]; *see, e.g.*, [RP 545] ("Applicant should be allowed the opportunity to put on evidence in support of the facts claimed in its Application."); [RP 547] ("Applicant should be allowed the opportunity to put on evidence in support of the Application."); [*id.*] ("Because the Application satisfied

the statutory criteria and was accepted by the State Engineer, this matter must now proceed to hearing."); [RP 550] ("The Motions [to Dismiss] should be denied, and the Applicant should be allowed to present its evidence to the State Engineer.").

Notwithstanding the State Engineer's acknowledgment of the issues on the merits and Augustin's timely request for an evidentiary hearing, however, the State Engineer granted the motions to dismiss and denied the Application without an evidentiary hearing. [RP 4-7]. Denial of the Application without a hearing on its full merits was error. *Lion's Gate Water*, 2009-NMSC-057, ¶ 31; *Derringer*, 2001-NMCA-075, ¶ 13; *see* §§ 72-2-16, 72-2-17; 19.25.4.8 NMAC.

In the agency and in the district court, several justifications were advanced for denying the Application without an evidentiary hearing. As explained below, however, each of those justifications is meritless.

2. The State Engineer erred in determining that he had authority to refuse to consider the Application

In his order denying the Application, State Engineer purported to invoke jurisdiction over the matter pursuant to Article 5 as well as Articles 2 and 12. [RP 5 ¶ 2]. He cited Section 72-5-7 as authority to "refuse to consider" the Application [RP 5 ¶ 7]. He concluded that "[i]n keeping with NMSA section 72-5-7, [the Application] should not be considered by the State Engineer," and on that basis he denied the Application without an evidentiary hearing. [RP 7 ¶¶ 24-26].

The State Engineer's reliance on Section 72-5-7 for authority to refuse to consider an underground water application was error. As explained above, Section 72-5-7 applies only to *surface water* and does not apply to a case involving an application to appropriate *underground water*. The plain language and the history of the statutes that do govern—i.e., Sections 72-2-16, 72-2-17, and 72-12-3—make clear that the State Engineer lacked authority to summarily reject or "refuse to consider" the Application.

In the district court, the State Engineer and Protestants attempted to minimize the differences between Section 72-5-7 and Section 72-12-3. Both cited the decision in *City of Albuquerque v. Reynolds*, which recognized that "substantive rights" in surface water and underground water, once obtained, are identical. [RP 828; Tr. 14]; *see Reynolds*, 71 N.M. at 437, 379 P.2d at 79. As the district court acknowledged, however, the *Reynolds* opinion itself defeats the attempt to conflate the separate procedural processes for surface water and underground water. [RP 884]. Although the substantive rights, once obtained, are identical, the fact remains that the processes to obtain them are different: "'The legislature has provided somewhat different administrative procedure [sic] whereby appropriators' rights may be secured from the two sources.'" *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 21, 143 N.M. 142, 173 P.3d 749 (quoting *Reynolds*, 71 N.M. at 437, 379 P.2d at 79).

The question presented for this Court's review is quintessentially one of process rather than substantive rights, *viz.*, whether the State Engineer had authority to "refuse to consider" the Application and to deprive Augustin of an evidentiary hearing. Sections 72-2-16 and 72-12-3 did not give the State Engineer such authority. The State Engineer was mistaken to reach for a provision from a separate article of the Water Code to justify his action.

3. The State Engineer erred in denying the Application on the ground that to consider it would be contrary to sound public policy

The State Engineer compounded his error by denying the Application on the basis of a legally irrelevant and unauthorized determination. The State Engineer determined that it would be "contrary to sound public policy" to consider the Application. [RP 7 ¶¶ 21-23]. The controlling standard, as prescribed by the Legislature, is set out in Section 72-12-3(E), which directs the State Engineer to consider four issues in deciding whether to grant a permit: (1) whether there are "unappropriated waters" in the underground source in controversy, (2) whether the proposed appropriation would "impair existing water rights from the source," (3) whether it would be "contrary to conservation of water within the state," and (4) whether it would be "detrimental to the public welfare of the state." § 72-12-3(E). As previously stated, the State Engineer himself initially acknowledged that four-part governing standard for ruling on the Application. [RP 308].

In his final order, however, the State Engineer did not address any of the four controlling issues, but instead denied the Application without an evidentiary hearing on the legally irrelevant basis that, in his view, it would be "contrary to sound public policy" to consider the Application. [RP 7 ¶¶ 21-26]. The State Engineer was limited, however, to the power and authority expressly granted or necessarily implied by the governing statute. *Tri-State Generation & Transmission Ass'n, Inc.*, 2012-NMSC-039, ¶ 13. It was error to refuse to consider the Application on the basis of a criterion not even cognizable under the statute. *See id.*

4. The district court erred in upholding the denial of the Application without an evidentiary hearing

The district court recognized that Section 72-5-7 did not support the State Engineer's refusal to consider the Application because that statute does not apply in proceedings involving underground water. [RP 884]. Nevertheless, the court ruled that the State Engineer had authority to deny the Application without an evidentiary hearing: "[I]t was within the State Engineer's authority, pursuant to Section 72-12-3(F), to deny the application without a hearing." [RP 882]. The court acknowledged that the State Engineer had accepted the Application for filing and publication, reflecting a "determin[ation] that the form had been completed with all the information required." [*Id.*]. The court reasoned, however, that if the State Engineer was required to hold an evidentiary hearing once he had accepted

an application, "the statutory language in Subsection F allowing him to deny an application with a hearing would be negated." [RP 883].

The district court's error was that it attempted to read the language of Subsection 72-12-3(F) in isolation. That subsection provides that "the state engineer may deny the application without a hearing." § 72-12-3(F). But Section 72-2-16 adds that if the State Engineer chooses to enter a decision "without holding a hearing," any person thereby aggrieved is entitled to a post-decision hearing. § 72-2-16; *see also* 19.25.4.8 NMAC. Section 72-2-17 in turn makes clear that the requisite hearing is an evidentiary hearing. If the district court's interpretation of Subsection 72-12-3(F) were correct, the language of Section 72-2-16 entitling an aggrieved person to a hearing would be negated—the very mistake that the district court sought to avoid. [RP 883]. Neither Subsection 72-12-3(F) nor Section 72-2-16 should be interpreted in isolation. Rather, the two coordinate provisions addressing the right to a hearing in an underground water proceeding should be construed harmoniously with each other. *Lion's Gate Water*, 2009-NMSC-057, ¶ 23; *see id.* ¶ 25 (construing Section 72-5-7 harmoniously with Section 72-2-16).

Furthermore, the history and background of Sections 72-12-3(F) and 72-2-16 provide an especially compelling reason to construe the two statutes together. As elaborated above, these two particular statutes evolved in tandem. 1967 N.M.

Laws ch. 308, §§ 1-2; 1971 N.M. Laws ch. 134, §§ 1, 3. From this history it is evident that the Legislature was not divesting an applicant of the right to a hearing when it allowed the State Engineer to enter a decision denying an application "without a hearing." § 72-12-3(F). To the contrary, the Legislature knew that an applicant aggrieved by such a decision was "entitled to a hearing" thereafter if no evidentiary hearing was held beforehand. § 72-2-16; *see Derringer*, 2001-NMCA-075, ¶ 13 (holding that plain language of Section 72-2-16 requires State Engineer to hold post-decision hearing when no pre-decision hearing has been held).

The district court's attempt to interpret Subsection 72-12-3(F) in isolation not only is at odds with familiar canons of statutory construction, *see Lion's Gate Water*, 2009-NMSC-057, ¶ 23, but also would create substantial doubts about the constitutionality of the State Engineer's proceedings. To reiterate, the essential purpose of the hearing requirement is afford due process to the applicant as well as other parties to the State Engineer's proceedings. *D'Antonio*, 2008-NMCA-139, ¶ 9; *Derringer*, 2001-NMCA-075, ¶ 13. In order to avoid the constitutional problem that would arise if that purpose were ignored, the State Engineer's authority to deny an application "without a hearing," § 72-12-3(F), should be construed in light of the State Engineer's duty to provide a hearing to a person aggrieved by such a denial, § 72-2-16. *See Chatterjee*, 2012-NMSC-019, ¶ 18.

The district court ruled that the State Engineer could decline to hold a hearing on Augustin's Application for two reasons: First, in the district court's view, the Application was not sufficient specific in identifying the proposed beneficial uses and places of use of the water for which Augustin requested a permit. [RP 886-97]. Second, in the court's view, the Application contradicted the prior appropriation doctrine in that, if the Application was approved, Augustin would be able to divert water for speculative purposes without applying it to beneficial use. [RP 897-903].

It is immediately apparent that neither of the grounds cited by the district court justifies the State Engineer's fundamental failing in this case, which was to deprive Augustin of the evidentiary hearing to which it was entitled. Rather, the court simply took for granted that the State Engineer has discretion under Section 72-12-3(F) to decide whether to grant a hearing. [RP 882-84]. The court reasoned that "Section 72-12-3(F) does not explain under what circumstances the State Engineer may deny an application." [RP 884]. It concluded, however, that the State Engineer is empowered to examine an application "on its face" and to proceed to deny the application without a hearing if he or she determines that the application is "facially invalid." [*Id.*].

Sections 72-12-3(F) and 72-2-16, read in connection and in harmony with each other, do not countenance such a result. As this Court has previously held, the

hearing requirement of Section 72-2-16 is not satisfied by written pleadings such as the motions to dismiss entertained by the State Engineer. *Derringer*, 2001-NMCA-075, ¶ 15. Moreover, a finding by the State Engineer that an application lacks specificity is no basis for denying the applicant an evidentiary hearing. *Id.* ¶ 13. At a hearing, Augustin, as the applicant, must of course bear the burden of producing evidence to establish the specific uses and places of use of water it proposes to appropriate. If it fails to carry its burden, the State Engineer may of course deny its Application. §§ 72-12-3(E), (F). But to preclude Augustin from offering its evidence on the basis that the Application on its face is vague is to prejudge the evidence and to announce an irrebuttable presumption depriving Augustin of a property interest. *See, e.g., State v. Druktenis*, 2004-NMCA-032, ¶ 55, 135 N.M. 223, 86 P.3d 1050 (recognizing that irrebuttable presumption may be unconstitutional as "'lack[ing] critical ingredients of due process'") (quoting *U.S. Dep't of Agriculture v. Murry*, 413 U.S. 508, 513 (1973)).

The State Engineer's initial consideration of the "preliminary matter" of the facial validity of the Application [RP 309] is precisely the sort of "partitioning" of the issues that our Supreme Court has repudiated. *Lion's Gate Water*, 2009-NMSC-057, ¶ 31. The issue of facial validity was raised by Protestants' motion to stay consideration of the merits of the Application and to instead litigate certain preliminary issues of Protestants' choosing. [RP 258-64, 309]. Protestants' motion

to dismiss the Application avowed to test the "legal sufficiency" of the Application under a Rule 12(b)(6) standard. [RP 338]; *see* Rule 1-012(B)(6) NMRA. *Cf. Southwestern Colo. Water Conservation Dist.*, 671 P.2d at 1321 (rejecting trial court's treatment of proceeding "as one in the nature of a motion to dismiss or for summary judgment"). Such piecemeal litigation of the issues presents exactly the problem that our Supreme Court warned of when it drew a bright line at the single dispositive determination that the State Engineer is statutorily authorized to make without a hearing. *Lion's Gate Water*, 2009-NMSC-057, ¶ 31. As the procedural history of this case well demonstrates, the State Engineer's partitioned approach is neither efficient nor protective of the rights of the applicant. *See id.* The Supreme Court left no doubt that, except for the determination mandated by Section 72-5-7, the State Engineer "must consider the full merits of an application." *Lion's Gate Water*, 2009-NMSC-057, ¶ 31; *accord Southwestern Colo. Water Conservation Dist.*, 671 P.2d at 1321 (reversing dismissal of underground water applications without evidentiary hearing).

Finally, the grounds for denying the Application as cited by the district court also fail on their own terms. Augustin's proposed beneficial uses and places of use of water were not so broad or lacking in specificity that the State Engineer was rendered incapable of inquiring further as to the details of Augustin's proposal. The details of that proposal are exactly what the State Engineer is under a duty to

consider at an evidentiary hearing. *See Southwestern Colo. Water Conservation Dist.*, 671 P.2d at 1321. Moreover, the State Engineer has authority to issue a permit for "all *or a part* of the waters applied for, subject to the rights of all prior appropriators from the source." § 72-12-3(E) (emphasis added). The statute thus contemplates that the proceeding on an underground water application may entail narrowing and refining of the applicant's initial proposal as the facts adduced at the hearing may warrant. *See id.* What Section 72-12-3 does not authorize, however, is an outright refusal to consider the application on the ground that it is vague, or that the proposed beneficial uses and places of use of water are too many or too broad.

As for the district court's view that the Application contradicts the principles of beneficial use and public ownership of water, the court's concerns reflect a misapprehension of the prior appropriation doctrine. As the district court recognized [RP 897], that doctrine holds that (1) "beneficial use . . . forms 'the basis, the measure and the limit of the right to use of the water,'" *Tri-State Generation & Transmission Ass'n, Inc.*, 2012-NMSC-039, ¶ 40 (quoting N.M. Const. art. XVI, § 3) (additional citation and internal quotation marks omitted), and (2) the public retains ownership of water, i.e., that "a water right is a limited, usufructuary right providing only a right to use a certain amount of water to which one has a claim via beneficial use," *id.* ¶ 41 (citation and internal quotation marks omitted). The district court reasoned that both elements of the prior appropriation

doctrine would be undermined "if Applicant's theory of securing water rights is allowed to stand" because the face of the Application does not identify a specific place and beneficial use of water with definiteness and certainty. [RP 897-98]. Instead, according to the district court, *if the Application was approved* based solely on the contents appearing on its face, Augustin could divert water without regard to beneficial use and direct the use of water without regard to public ownership. [RP 898-903].

The district court's reasoning overlooked the issue presented for its review, which was not the hypothetical question of what might happen if the State Engineer were to *approve* the Application without an evidentiary basis, but the concrete question of whether the State Engineer committed error when he *denied* the Application without an evidentiary basis. Contrary to the district court's assumption, nothing in the prior appropriation doctrine required Augustin to furnish on the face of the Application all of the evidentiary detail necessary to justify a permit. Rather, the Application was merely the first step in the proceeding before the State Engineer, and the evidence in support of Augustin's request for a permit should have been tested at an evidentiary hearing rather than on the face of the Application.

The prior appropriation doctrine accommodates the process of securing a permit and applying water to beneficial use through the principle of relation back,

under which the priority of an appropriation relates back to the date of initiation of the process. *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 35, 135 N.M. 375, 89 P.3d 47 ("If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated.") (citation and internal quotation marks omitted). Implicit in the relation-back principle is the recognition that "establishing a water right is a process that takes a period of time." *Hanson v. Turney*, 2004-NMCA-069, ¶ 8, 136 N.M. 1, 94 P.3d 1; *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 473, 362 P.2d 998, 1002 (1961) ("It is oft-times a long drawn out enterprise that must be accomplished between initiation of a right and the final act of irrigating a quantity of land. Months and years may reasonably elapse."); *Snow v. Abalos*, 18 N.M. 681, 694, 140 P. 1044, 1048 (1914) (recognizing that "[t]he intention to apply to beneficial use, the diversion works, and the actual diversion of the water necessarily all precede the application of the water to the use intended"). The prior appropriation doctrine serves to protect and encourage investment in water resources by preserving an applicant's priority while the requisite administrative and physical steps are taken to obtain a permit, divert the water, and apply it to beneficial use. *Yeo*, 34 N.M. at 614, 286 P. at 971 (observing that prior appropriation doctrine protects invested capital and improvements); *accord In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 48 P.3d 1040, 1049 (Wyo. 2002)

("Relation back encourages the development of water resources by allowing prospective appropriators to initiate appropriation and then complete financing, engineering, and construction aspects of their projects with the understanding that, with diligent pursuit and development, their rights will become absolute upon beneficial use with a priority date of the initial action.") (citing 94 C.J.S. Waters § 365 (2001)).

A necessary implication of the relation-back principle is that if Augustin is unable to prove to the State Engineer's satisfaction at an evidentiary hearing that it will put the requested water to beneficial use with definiteness and certainty, then it will properly be denied both a permit and priority. Contrary to the district court's assumption, however, it is premature to judge from the face of the Application whether Augustin will apply the water to beneficial use or whether instead it intends to acquire the water for a speculative purpose. By upholding the State Engineer's denial of the Application without an evidentiary hearing, the district court not only precluded Augustin from offering evidence of its legitimate intent to put the water to beneficial use, but in fact it effectively determined—without any basis in evidence—that Augustin's intent was improperly speculative. That result is incorrect and unfair to Augustin. *Southwestern Colo. Water Conservation Dist.*, 671 P.2d at 1321; *see Juneau v. Intel Corp.*, 2005-NMSC-002, ¶ 27, 139 N.M. 12, 127 P.3d 548 ("Trial is the only sure way to test [allegations regarding wrongful

intent], at which time the fact-finder can weigh the evidence and judge the credibility of the principal witnesses."); *Maxey v. Quintana*, 84 N.M. 38, 42, 499 P.2d 356, 360 (Ct. App. 1972) ("Intent is usually a question for the jury.").

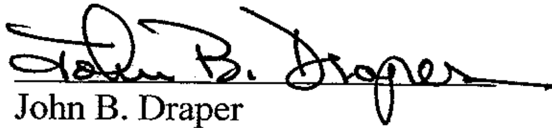
Just as the initial pleading in a civil suit need only set out "a short and plain statement of the claim," Rule 1-008(A)(2) NMRA, leaving the presentation of evidence for trial, so Augustin's Application needed only provide the information required by Section 72-12-3(A), leaving the presentation of proof for the evidentiary hearing. The State Engineer erred in depriving Augustin of the opportunity to offer its proof on "the full merits" of the Application. *Lion's Gate Water*, 2009-NMSC-057, ¶ 31. The district court erred in upholding the State Engineer's failure to afford Augustin an evidentiary hearing.

CONCLUSION

The district court's decision and order on Protestants' motion for summary judgment should be reversed and the case should be remanded to the State Engineer for an evidentiary hearing on the Application.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.



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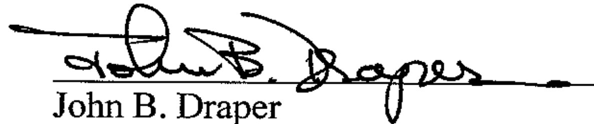

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