IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v.

JOHN D'ANTONIO, P.E.,

New Mexico State Engineer-Appellee,

and

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.*,

Protestants-Appellees.

No. A-1-CA-38615
Catron County
D-728-CV-2018-00026
Judge Matthew Reynolds

COMMUNITY PROTESTANTS-APPELLEES' ANSWER BRIEF

ORAL ARGUMENT REQUESTED

NEW MEXICO
ENVIRONMENTAL LAW CENTER

Gail Evans
Douglas Meiklejohn
1405 Luisa Street, Suite #5
Santa Fe, N.M. 87505
Telephone: (505) 989-9022
dmeiklejohn@nmelc.org
gevans@nmelc.org
Attorneys for the Community Protestants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Supreme Court Cases

New Mexico Court of Appeals Cases

New Mexico Constitution

New Mexico Statutes

Statement of Compliance

Counsel for the Protestants-Appellees hereby certifies that this Answer Brief complies with the word limitation of 11,000 words set forth in Rule 1-318(F)(3) NMRA. The body of this Answer Brief contains 10,998 words, Times New Roman typeface. The word count for this Answer Brief was obtained using Microsoft Word 2016.

INTRODUCTION

I. Background

This appeal represents Augustin Plain Ranch's ("APR's") continued quest to hoard 54,000 acre feet (approximately 17 billion gallons) per year of underground water from the San Agustin Basin until APR is able to negotiate a sale of the right to use that water for as yet unknown uses to unknown users – all in violation of the New Mexico Constitution and New Mexico law. APR's efforts have already been denied by the New Mexico State Engineer and the Seventh Judicial District Court ("the District Court") twice, once when the State Engineer and the District Court addressed the application APR filed in 2007 ("the Original Application") and again when they addressed the application that APR filed in 2014 ("the Current Application").[1]

The Original Application for this massive appropriation of underground water was denied by the State Engineer as being speculative, vague, overbroad, and in violation of the New Mexico Constitution and New Mexico law since APR had not demonstrated that it was "ready, willing and able to proceed to put water to beneficial use." **[RP 860 (*State Engineer's March 30, 2012 Order Denying***

[1] APR refers to the Current Application as "corrected" because it changed inaccurate descriptions of the locations of wells provided in an earlier version of the Application, not because it addressed any of the grounds on which the earlier Application was dismissed.

***Application ("2012 State Engineer Order")), ¶19.*]** The District Court agreed, stating:

> Because Applicant failed to specify beneficial uses and places of use in its application and chose to make general statements covering nearly all possible beneficial uses and large swaths of New Mexico for its possible places of use, the State Engineer had no choice but to reject the application. The application does not reveal a present intent to appropriate water, but merely to divert it and explore specific appropriations later.

[RP 4786 (*District Court's November 14, 2012 Memorandum Decision on Motion for Summary Judgment ("2012 District Court Decision")) p.20*] Indeed, both the State Engineer and the District Court gave APR clear reasons for the denial of the Original Application, and therefore clear instructions on what would be necessary for a future application to pass legal muster.

Despite that, APR filed the Current Application, which is almost identical to the Original Application. The Current Application, which is the subject of this appeal, only states generally that the 54,000 acre feet per year of water would be used for unspecified "Municipal and Other Use: Commercial water sales." **[*RP 474 (Current Application, 1 ¶2)*]** Like the Original Application, the Current Application states as well that the "water will be put to use by municipal, industrial and other users along the pipeline route"[2] **[*RP 476 (Current Application, 3, ¶5.g)*]**, without explaining what these "municipal, industrial, and other users"

[2] The proposed pipeline would be about 140 miles long. *See* page 12 *infra.*

would use the water for. **[*Id.*]** Like the Original Application, the Current Application also states that the water will be used for unspecified municipal purposes within the authorized service areas of the six municipal entities listed in Attachment 2 (Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, and Rio Rancho).[3] **[*RP 476 (Current Application, 3, ¶5.g); RP 490 (Current Application, Attachment 2, 4, ¶5.A)*].**

The State Engineer and the District Court explicitly rejected this approach in the Original Application. Specifically, the State Engineer wrote, and the District Court quoted in full in its decision to deny the Original Application:

> The face of the subject amended Application requests almost all possible uses of water, both at the Ranch location and at various unnamed locations within "Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin…" but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights or would not be contrary to the conservation of water in the state or would not be detrimental to the public welfare of the state.

---

[3] Two of these entities – Magdalena and Socorro – protested the Current Application. **[*RP 2674-2676 (Socorro's protest)*]**; Magdalena's protest was dismissed for failure to pay the required $25.00 fee. **[*RP 2067 (State Engineer's Scheduling Order, Attachment A, p.4)*]**. The Chairwoman of the Albuquerque/ Bernalillo County Water Utility Authority has indicated that it will not purchase water appropriated from the San Agustin Basin by APR. **[*RP 3221 (Klarissa Pena Op-Ed in December 5, 2017 Albuquerque Journal, attached as Exhibit 2 to Community Protestants' Memorandum in Support of Motion for Summary Judgment in the District Court)*]**

[*RP 4735-4736 (2012 District Court Decision, 9-10, quoting 2012 State Engineer Order, ¶8)*] The State Engineer and the District Court rejected the Original APR Application because the application "failed to specify beneficial uses and places of use … and does not reveal a present intent to divert water." **[*RP 4786 (2012 District Court Decision, p.20)*]**

Despite these decisions by the State Engineer and the District Court, APR filed the Current Application with similarly broad and unspecified information about the uses for the proposed underground water to be appropriated. Just as with the Original Application, the State Engineer again had no choice but to reject the Current Application, and the District Court had no choice but to affirm the State Engineer's decision because the issues before the District Court were the same as the issues the District Court had already decided in the proceeding addressing the Original Application.

II. Summary of Proceedings

APR's efforts to appropriate underground water from the San Agustin Basin began with the filing of the Original Application in 2007, which APR amended in 2008. **[*RP 4728 (2012 District Court Decision, p.2)*]** The State Engineer denied the Original Application because it did not set forth the beneficial use or uses for the water to be appropriated or the place or places where that beneficial use or those beneficial uses would occur. **[*RP 861 (2012 State Engineer Order, p.5)*]**

APR appealed the State Engineer's ruling denying the Original Application to the District Court. **[*RP 4727 (2012 District Court Decision, p.1)*]** The District Court affirmed the State Engineer's Order denying the Original Application and dismissed the Original Application. **[*RP 4758 (2012 District Court Decision, p.32)*]**; **[*RP 863-864 (2013 District Court Order on Protestants' Motion for Summary Judgment (2013 District Court Order), pp.1-2)*]**. The District Court based its ruling on the following points:

- the Original Application failed to specify the beneficial use or beneficial uses for the water to be appropriated;
- the Original Application failed to specify the place or places where that beneficial use or those beneficial uses would occur; and
- the Original Application contradicted beneficial use as the basis of a water right and the public ownership of water.

[*RP 4740 (2012 District Court Decision, p.14)*]

The District Court also pointed out that New Mexico law does not "countenance anyone acting as 'dog in the manger' by appropriating water for which the appropriator has no use." **[*RP 4750 (2012 District Court Decision, p.24)*]** Finally, the District Court rejected APR's allegation that it was entitled to, but was inappropriately denied, an evidentiary hearing before the State Engineer. **[*RP 4737-4738 (2012 District Court Decision, pp.11-12)*]**

APR filed the Current Application, which is the subject of this appeal, on July 14, 2014. **[*RP 3078 (State Engineer August 1, 2018 Report and Recommendation Granting Motions for Summary Judgment ("2018 State Engineer Decision"), p.2*]** APR then amended or revised the Current Application twice – once on December 23, 2014 and once on April 28, 2016. **[*Id.*]** The Current Application, like the Original Application, seeks to appropriate 54,000 acre feet of underground water per year from 37 wells to be drilled on the Augustin Plains Ranch, near Datil in Catron County. **[*RP 473 (Current Application, p.1]*; *RP 487 (Current Application, Attachment 2, p.1, ¶1)*]** Timely protests were filed by the Community Protestants, the Catron County Board of County Commissioners, and other parties within the time prescribed in the notice of the Second Application. **[*RP 2074-2078 (State Engineer's Scheduling Order, Attachment C)*]**

Subsequently, both the Community Protestants and the Catron County Board of County Commissioners filed motions for summary judgment, seeking dismissal of the Current Application. **[*RP 3077 (2018 State Engineer Decision, p.1)*]** The State Engineer conducted a hearing on those motions on December 13, 2017, at which the State Engineer Hearing Officer heard arguments by counsel for the Community Protestants, counsel for the Catron County Board of County

Commissioners, counsel for APR, and counsel for the Water Rights Division of the State Engineer's Office. **[*RP 3077-3078 (2018 State Engineer Decision, pp.1-2)*]**

During that hearing and in their pleadings filed prior to the hearing, counsel for the Community Protestants and counsel for the Catron County Board of County Commissioners argued: 1) the Current Application failed to provide required information; 2) the Current Application should be denied on the basis of the law of the case, *res judicata*, or collateral estoppel; 3) the Current Application is facially invalid; and 4) the Current Application is speculative, contrary to sound public policy, and detrimental to public welfare. In their pleadings, the Community Protestants also argued that: 5) APR was not entitled to an evidentiary hearing. **[*RP 3078 (2018 State Engineer Decision, p.2); RP 2986-2987 (Community Protestants' Consolidated Reply to APR's Response and the Water Rights Division's Response to the Community Protestants' Motion for Summary Judgment, pp.37-38; RP 3119-3127 (Community Protestants' Response in Opposition to the Applicant's Expedited Request for a Post-Decision Evidentiary Hearing, pp.1-9)*]**

Following the December 13, 2017 hearing, the State Engineer denied the Current Application because it did not specify the beneficial use or beneficial uses for the water to be appropriated or the place or places where that beneficial use or those beneficial uses would occur. **[*RP 3081, 3084, 3087-3089 (2018 State*

Engineer Decision, pp.5, 8, 11-13, ***¶¶16-23, 25, 49, 70-73, "Therefore" paragraph (on page 13)***, ***and State Engineer's Acceptance and Adoption of Report and Recommendation***] The State Engineer also cited to several sections of the Water Code concerning hearings and determined that the hearing on the motions for summary judgment satisfied any statutory hearing requirement, if indeed one exists. [***RP 3079-3080 (2018 State Engineer Decision, pp.3-4***]

APR appealed to the District Court from the 2018 State Engineer's Decision. The State Engineer, APR, the Community Protestants, and Catron County filed motions for summary judgment. On July 24, 2019, the District Court entered its Memorandum Decision on Motions for Summary Judgment ("2019 District Court Decision") finding that the Current Application was in all legally relevant ways identical to the Original Application:

> The current application and the former share the same basic idea that APR wants to implement: a 140-mile pipeline to provide water in seven counties along the Rio Grande to be pumped from 37 wells near Datil, New Mexico. Like the former case that ended adversely for APR, the new one also raises the issue of facial invalidity. Some aspects of the applications differ in that APR has narrowed the possibilities for beneficial use from eleven to two or three municipal and commercial sales for industrial and commercial entities. The possibilities for place of use remain the same, somewhere in the seven counties of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe. But APR actually litigated and lost on summary judgment years ago on the same issues presented here, that is, whether its hopes and possibilities, detailed as they may be in this second round, are facially invalid under the New Mexico Water Code, case law, and our state's constitution.

[***RP 4720 (2019 District Court Decision, p.3)***]

The District Court also held that all four elements of collateral estoppel had been met and dismissed the Current Application with prejudice, attaching the entire 2012 District Court Decision to its 2019 District Court Decision, and ending with the following decisive statement: "The people of New Mexico should not have their water tied up any longer with possibilities." **[*Id. pp.5-6*]**

APR then appealed to the Court of Appeals.

III. Statement of facts in the Current Application.

The Community Protestants are including this statement of facts concerning the Current Application because the Statement of Facts in APR's Brief-in-Chief is inadequate.

A. The Current Application fails to specify the beneficial use or beneficial uses for the water to be appropriated.

In response to the groundwater appropriation application form's request for information about the purpose of use and amount of water, the Current Application indicates that the water will be used for unspecified "Municipal and Other Use: Commercial Water Sales". **[*RP 473 (Current Application, p.1, ¶2)*]** The Current Application also indicates that the "water will be put to use by municipal, industrial and other users along the pipeline route shown in Exhibit D to Attachment 2." **[*RP 476 (Current Application, p.3, ¶5.g)*]** The Current Application does not explain what these "municipal, industrial, and other users" would use the water for. **[*Id.*]**

The Current Application states that the water to be appropriated will be used for unspecified municipal purposes within the authorized service areas of the six municipal entities listed in Attachment 2 (Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, and Rio Rancho). As explained in note 3 above, two of these entities – Magdalena and Socorro – protested the Current Application and the Chairwoman of a third entity – the Albuquerque/Bernalillo County Water Utility Authority – has indicated that the Authority will not purchase the right to use water appropriated from the San Agustin Basin by APR.

In Attachment 2, the Current Application indicates that the water to be appropriated would be used for municipal and commercial sales at locations along the 140 mile length of the proposed pipeline. **[*RP 487 (Current Application, Attachment 2, p.1, Section I)*]** The Current Application does not explain what particular uses would be involved in these "municipal purposes and commercial sales." **[*Id.*]**

The Current Application indicates that the appropriated water used for bulk sales will be put to use by municipal and investor-owned utilities, commercial enterprises, and state and federal government agencies. **[*RP 491 (Current Application, Attachment 2, p.5, Section III, ¶6.B)*]** The Current Application does

not specify what these utilities, enterprises, and agencies will use the water to be appropriated for. **[*Id.*]**

B. The Current Application fails to designate the place or places for beneficial use or beneficial uses of the water to be appropriated.

In response to the groundwater appropriation application form's request for information about the "county where water right will be used", the Current APR Application indicates "Parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties." **[*RP 474 (Current Application, p.2, ¶3)*]** The Current Application also states that the water used for unspecified municipal purposes will be put to use within the authorized service areas of six municipal entities (Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, and Rio Rancho). **[*RP 490 (Current Application, Attachment 2, p.4, ¶5.A)*]**

In response to the groundwater appropriation application form's request for information about the "county where water right will be used", the Current Application states "Please see Attachment for additional detail." Attachment 2 to the Current Application indicates that the appropriated water would be used for municipal purposes and commercial sales and other uses at locations along the length of the proposed pipeline. **[*RP 487 (Current Application, Attachment 2, p.1)*]** The Current Application does not specify the particular locations along the

140 mile length of the proposed pipeline at which the water to be appropriated would be used. **[*Id.*]**

C. The Current Application's proposed pipeline would be approximately 140 miles long.

The Current Application proposes to convey the appropriated water through a pipeline from the Augustin Plains Ranch to the Albuquerque metropolitan area. **[*Id.*]** According to the scale provided in the Current Application's Figure 6, the proposed pipeline would be approximately 140 miles long. **[*RP 499 (Current Application, Attachment 2, Exhibit A, p.4, Figure 6)*]** The Approximate 140 mile length of the proposed pipeline is also demonstrated by the elevation and GPS coordinates for the Alternative A route for the proposed pipeline set forth in Appendix A to Exhibit D to the Current APR Application's Attachment 2. **[*RP 528-531 (Current Application, Attachment 2, Exhibit D, Appendix A, pp.13-16)*]**

D. The Current Application proposes a two stage procedure.

The Current Application proposes a two stage hearing procedure in which the first stage would consist of an evaluation of the hydrologic issues related to the Application, including the amount of water available for appropriation without impairing other water rights and the amount of enhanced recharge. **[*RP 488 (Current Application, Attachment 2, p.2)*]** The Current Application also proposes that "once the order on hydrologic issues is entered" APR requests that it "be given

up to 12 months to adjust and finalize the individual purposes of use, places of use, and amounts for each use." **[*RP 489 (Current Application, Attachment 2, p.3)*]**

In addition, the Current Application proposes that "Stage 2 [of the hearing procedure] would begin when [APR] submits an Amended Application with additional detail regarding the types and places of use for the water based on the order on hydrologic issues," and that "Stage 2 consists of consideration of whether the detailed purposes and places of use can be approved without impairment of other rights, detriment to the public welfare, or being contrary to conservation of water within the State." **[*Id.*]** Finally, the Current Application indicates that the "individual detailed purposes and amounts of use will be finalized in Stage 2 of the application process." **[*RP 489 (Current Application, Attachment 2, p.3, Section III.2)*]**

E. The Current Application is materially identical to the amended Original APR Application.

Like the Current Application, the Original Application proposed to:

- extract 54,000 acre feet of underground water per year from the San Agustin Basin **[*RP 4729 (2012 District Court Decision, p.3)*]**;
- extract the underground water using 37 wells on APR's ranch in Catron County, New Mexico **[*Id.*]**;
- use the water to be appropriated for a wide variety of unspecified purposes, including "municipal, industrial, commercial" and, under "other,"

"replacement" **[*RP 4729, 4741 (2012 District Court Decision, pp. 3, 15)*]**;

and

- use the water to be appropriated in any of several large unspecified areas, including:

> [a]ny areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries in the Rio Grande Basin in New Mexico.

[*RP 4729-4730 (2012 District Court Decision, pp.3-4)*]

The only substantive difference between the Original Application and the Current Application is that the Original Application indicated that water to be appropriated could be used for eleven different possible uses and the Current Application has narrowed the possible uses of the water to two or three possible uses. **[*RP 4729 (2019 District Court Decision, p.3)*]**

ARGUMENT

IV. The Court of Appeals should review the District Court Decision *de novo.*

The District Court Decision dismissing the Current Application was based on motions for summary judgment filed by the Catron County Board of County Commissioners, the Community Protestants, the State Engineer, and APR. **[*RP 4718 (2019 District Court Decision, p.1)*]** Because the Decision was based on motions for summary judgment, the Court of Appeals should review that Decision

de novo. Badilla v. Wal-Mart Stores East, Inc., 2017-NMCA-021, ¶7, 389 P.3d 1050, 1053.

Moreover, because the District Court Decision determined that there were no material issues of fact in dispute, the Court of Appeals is not required to view the appeal in the light that is most favorable to APR, the party that opposed the summary judgment. *Thompson v. Potter*, 2012-NMCA-014, ¶7, 268 P.3d 57, 61.

The Court of Appeals' review also should be based on undisputed facts that are set forth in documents. *Bauer v. College of Santa Fe*, 2003-NMCA-121, ¶2, 134 N.M. 440. In this matter, the undisputed facts that were the basis of the District Court's Decision are set forth in three documents: the Original Application, **[*RP 1122-1134*],** the District Court Memorandum Decision on Motion for Summary Judgment dated November 14, 2012 affirming the State Engineer's Order dismissing the Original APR Application ("2012 District Court Decision"), pp. 1, 32 **[*RP 4727, 4758*]**, and the Current Application. **[*RP 473-635*]**.

V. APR was not entitled to an evidentiary hearing.

Before denying the Current Application, the State Engineer held a hearing on motions for summary judgment at which all parties had the opportunity to present their case based on the undisputed facts set forth in the Current Application. APR asserted at that hearing and continues to assert, without merit, that it was entitled to an evidentiary hearing before the State Engineer. This is

incorrect. The statute governing hearings on applications to appropriate underground water, which APR neglects to even mention, let alone analyze, does not require a hearing before the State Engineer denies an application. Moreover, even if the more general provisions of the Water Code concerning hearing procedures which apply to surface water applications were somehow to apply to this groundwater application procedure, the State Engineer still complied with those rules and afforded APR sufficient process before denying its application.

Finally, in accordance with the doctrine of collateral estoppel, APR is precluded from even raising this argument since it raised and lost this same argument in the proceedings concerning the Original Application. As the State Engineer and the District Court have now each found twice, an evidentiary hearing is not required before denying an application for underground water appropriation.

A. The statute governing appropriation of underground water provides that the State Engineer may deny an application to appropriate underground water without a hearing.

Although APR's Brief-in-Chief cites to other hearing provisions in the water code, APR completely fails to discuss the hearing provision of the underground water statute, which provides:

> If objections or protests have been filed within the time prescribed in the notice or if the state engineer is of the opinion that the permit should not be issued, *the state engineer may deny the application without a hearing*, or before the state engineer acts on the application, may order that a hearing be held. The state engineer shall notify the applicant of the action by certified mail sent to the address shown in the application.

NMSA 1978, Section 72-12-3(F).

There is no ambiguity in this statutory provision. It clearly states that if protests have been timely filed, the State Engineer can deny an application for underground water appropriation without a hearing and that, if protests have been timely filed, the State Engineer can choose to hold a hearing if the State Engineer decides to do so. No hearing is required before denying an application to appropriate underground water. Indeed, the statute indicates that the whole point of the hearing is to ensure that the protests to an application for groundwater application are duly considered at a hearing.

The previous section of the underground water section of the statute, NMSA 1978, Section 72-12-3(E) sets forth the procedure for granting a petition where protests are not timely filed. There, the State Engineer shall grant the application if the following is true: (1) there is water available to be appropriated; and if: (2) the proposed appropriation would not impair existing water rights; (3) is not contrary to conservation of water within the state; and (4) is not detrimental to the public welfare of the state. No mention of a hearing is made in this section. Thus, the statute mandates that if the application meets the requirements of the law, and is not protested, it shall be granted and no hearing is required. If the application is protested, a hearing can be held and the application will be granted or denied, depending on whether it meets the requirements in Section 72-12-3(E). Again,

when protests are filed, the application can be denied with or without a hearing. *See* 2012 District Court Decision, p.12 ("Section 72-12-3(F) provides the statutory authority for the State Engineer to deny an application without a hearing…") **[*RP 4738*]**

APR continues to cite to the wrong statute when it argues that it is entitled to an evidentiary hearing on its Current Application to appropriate underground water.[4] APR does not dispute that it has applied to appropriate underground water. Indeed, it checked off the box on the application that reads: "Application to Appropriate Groundwater (72-12-3)" **[*RP 474 (Current Application, 1)*]** which indicates the type of application and the applicable statutory section. Thus, even the Current Application makes clear that Section 72-12-3 is the statute that governs the procedure the State Engineer must follow when considering an application for an underground water application.

Importantly, in this case the State Engineer held a hearing, even though one was not required, which makes APR's position even weaker. Still not satisfied, APR argues that the State Engineer should have held an "evidentiary hearing."

[4] Even though APR has litigated this point once before and lost, with the District Court explaining that APR was referring to the wrong statute, APR continues to do so. Indeed, APR does not even mention in its Brief-in-Chief the statute that applies to hearings concerning applications to appropriate groundwater. This does not seem to be simply a mistake, since both the parties and the District Court have referred to the correct statute repeatedly, both in the proceedings concerning the Original Application and in these proceedings concerning the Current Application.

There is no mention of an "evidentiary hearing" in the underground water statute. Here, where timely protests were filed, the State Engineer followed the law (72-12-3(F)) by holding a hearing and giving the parties ample opportunity to explain whether the Current Application complied with New Mexico law. The State Engineer's hearing on the motions for summary judgment that were the basis of the State Engineer's order denying the second Application was held in Reserve, New Mexico on December 13, 2017, and argument was presented during that hearing by counsel for the Community Protestants, counsel for the Catron County Board of County Commissioners, counsel for APR, and counsel for the State Engineer's Office Water Rights Division. **[*RP 3077 (2018 State Engineer Decision, p.1, ¶¶2-7)*]**. Moreover, APR neither alleged nor demonstrated during that hearing that it was not permitted to present its position. Thus, before denying the Current Application, the State Engineer considered the fully briefed motions for summary judgment, the undisputed facts which were set forth in the Current Application, and the legal argument of counsel.[5] Based on these undisputed facts established by the Current Application, it is clear that APR has again filed an application which does not set forth with specificity the place of use or the purpose for the use of the

[5] APR's responses to those motions failed to present any genuine issues of disputed material fact. **[*RP 3080 (2018 State Engineer Decision, p.4, ¶12)*]**

water to be appropriated. Thus, the State Engineer and the District Court both properly rejected the application after giving it due consideration.

B. The cases and sections of the Water Code upon which APR relies do not apply to applications to appropriate underground water.

APR mentions four articles of the Water Code in its Brief-in-Chief: (1) Article 2 concerning the duties of the Office of State Engineer; (2) Article 5 concerning surface water appropriations; (3) Article 7 concerning appeals; and (4) Article 12 concerning underground water appropriations. In terms of its argument that APR is entitled to a hearing, APR relies on the article of the Water Code concerning the duties of the State Engineer – Article 2 – and case law interpreting Article 5 – surface water law – and how those two articles work together. The surface water article of the water code – which is different from the underground water article – refers to Article 2 in several places. For example:

> Upon the filing of an application that complies with the provisions of this article and the rules established pursuant to this article, accompanied by the proper fees, the state engineer shall proceed in accordance with the provisions of Section 1 [72-2-20 NMSA 1978] of this 2019 act regarding notice of the application.

NMSA 1978, Section 72-5-4.

And later, in the section on hearings for surface water applications, the statute states: "If objection or protest to the application is timely filed, the state engineer shall advise interested parties, and **a hearing shall be held as otherwise provided by statute**." NMSA 1978, Section 72-5-5 (emphasis added). Thus, the

surface water article of the statute clearly relies on Article 2 for rules about hearings. In contrast, Article 12 concerning hearings in underground water applications does not refer to other sections of the statute but instead clearly states that a hearing is not required. *See* 72-12-3(F).

When APR finally addresses Article 12, the underground water section of the Water Code, at the end of its argument about hearings, APR does not mention the specific part of the statute that concerns hearings – 72-12-3(F). Even on page 17 of its Brief-in-Chief, where APR compares certain parts of the surface water article to certain parts of the underground water article, APR neglects to cite the part of the groundwater statute that clearly says the Engineer can deny an application without a hearing – 72-12-3(F). Thus, while APR is correct that the underground water chapter of the Water Code does not explicitly state that an application can be rejected on an initial determination that no water is available to appropriate **[*APR's Brief-in-Chief ("BIC") 17*]**, APR's analysis is incorrect because the underground water section of the Water Code provides that the Engineer has the authority to deny an application without a hearing if protests are filed. APR's allegation is unpersuasive because it ignores this most relevant part of the statute.

Likewise, APR's interpretation of New Mexico case law to support its position that a hearing is mandatory is unpersuasive, since nowhere does APR

mention that all of the cases it relies on to interpret the hearing sections of the water code are cases about surface water, not groundwater. Moreover, APR's argument that a complete record is necessary for purposes of appeal also is unpersuasive since an appellate court can and often does have a complete record without an evidentiary hearing, as is the situation in the many cases that are decided on motions for summary judgment without an evidentiary hearing.

APR's heavy reliance on *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, 137 N.M. 523, is completely misplaced because *Lions Gate* is a case about appropriations from the Pecos River, i.e. surface water, not underground water, and *Lion's Gate* does not address the issue in this case concerning whether an evidentiary hearing is required on an application for underground water. According to *Lion's Gate*, the case is about an interpretation of the surface water portions of the Water Code, and the standard of review for appeals:

> We are asked to determine the meaning and purpose of New Mexico Constitution Article XVI, Section 5 and Section 72-7-1(E), which define the standard of review for appeals from the State Engineer to district court, and whether the Sixth Judicial District Court erred when it found that it has "jurisdiction to hear all matters either presented or which might have been presented to [the State Engineer] as well as new evidence developed since the administrative hearing." In addition, we are asked to determine the meaning of Sections 72-5-4 and 72-5-7, which govern the procedure for publishing notice of applications for permits to appropriate water, and whether Lion's Gate's notice publication substantially complied with the process prescribed by the statutes.

Id. ¶16. Notably, the issues described above, concern an application to appropriate surface water – since the statute being interpreted is 72-5-4 and 72-5-7 – both parts of the surface water sections of the statute.

Moreover, while APR cites at length from the *Lion's Gate* decision to support its argument about the need for a complete record and the need to avoid "piece meal litigation," to the extent this argument is relevant at all, APR is misconstruing *Lion's Gate.* The *Lion's Gate* Court held that the Water Code did provide for the case to be decided and heard on appeal in several phases – first whether there was sufficient surface water to appropriate and then, if so, the secondary issues would be decided.

Likewise, another case relied on by APR, *Derringer v. Turney,* 2001-NMCA-075, 131 N.M. 40, is also a case about appropriations from a creek, i.e. surface water, not underground water. The holding in this surface water case is irrelevant to the questions presented here, since that case addresses the statute controlling surface water applications (72-2-16) and not the statute concerning underground water applications (72-12-3). Thus, while *Derringer* found that the Water Code requires the State Engineer to provide an aggrieved party a hearing in a surface water case, neither *Derringer* nor the Water Code has such a requirement in an underground water case. Applications for appropriations of underground water can be denied without a hearing. NMSA 72-12-3(F).

The third case that APR relies on, *D'Antonio v. Garcia,* 2008 NMCA-139, 145 N.M. 95, is also irrelevant because it is also a case about appropriations from a creek, i.e. surface water, not underground water and thus, the case does not provide an analysis about hearing requirements in applications for underground water. However, according to the *D'Antonio* Court, even in surface water cases, the right to a hearing is not absolute:

> *Derringer* does not hold that the right to a hearing under Section 72-2-16 after a party receives notice of the state engineer's decision, act, or refusal to act is absolute. *See Derringer*, 2001 NMCA 75, PP 12-16, 131 N.M. 40, 33 P.3d 40. Rather, the 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. See NMSA 1978, § 72-2-17 (1965).

Id.,¶9.

Thus, even if the statutory language upon which APR relies (Sec. 72-2-16) were to apply to underground water, the right to a hearing, let alone an evidentiary hearing, would not be absolute. This makes sense in a case that is decided on summary judgment, where no material issues of fact exist, and therefore, the case can be decided on oral argument. Cases in District Court are regularly decided on summary judgment motions, without an evidentiary hearing. Moreover, the very next section of the statute – 72-2-17 – which sets out the rules for the hearing, mandates that "irrelevant, immaterial or unduly repetitious evidence shall be excluded." In a hearing on a motion for summary judgment,

where undisputed material facts have been set forth by APR in its application, all additional evidence is "irrelevant, immaterial or unduly repetitious." In other words, even if the statutes upon which APR relies were to apply, an evidentiary hearing would not be necessary in this case. While APR argues that *Derringer* found that deciding the motions for summary judgment on the papers alone does not satisfy 72-2-17 **[*BIC 23*]**, APR neglects to mention that in this case, the summary judgment motions were not decided on the papers alone – a hearing was held. APR also neglects to mention the section of the statute – 72-2-17(B)(2) – which prevents the introduction of repetitious or immaterial evidence at a hearing.

Again, missing from APR's analysis of statutory construction, and the history of various amendments to the Water Code, is any mention of the specific section of the statute that says no hearing is required – Section 72-12-3(F). While APR outlines a long and tortured history of the Water Code, none of APR's arguments or cases in any way diminish the clear language of that statute which provides that an application for underground water can be denied without a hearing. It appears that APR does not squarely address NMSA 72-12-3(F) because this statutory language is clear and it cannot be explained away.

C. The District Court ruled in 2012 that APR was not entitled to an evidentiary hearing before the State Engineer, and APR therefore is precluded from re-litigating this issue.

In the proceedings concerning the Original Application, the District Court confirmed that Section 72-12-3.F authorizes the State Engineer to deny an application to appropriate groundwater without first conducting a hearing. In its ruling affirming the 2012 State Engineer's Order dismissing the Original Application, the District Court explained that Section 72-12-3.F indicates that no hearing is required before the State Engineer denies an application to appropriate groundwater, and pointed out that a determination that the State Engineer is required to conduct an evidentiary hearing would negate Section 72-12-3.F NMSA 1978. **[*RP 4738 (2012 District Court Decision, p.12)*]** As the District Court also explained in 2012, negating that section would be contrary to the mandate that every part of a statute be given effect. **[*Id.*]**, citing *Weiland v. Vigil*, 1977-NMCA-003, 90 N.M. 148, *cert. denied*, 90 N.M. 255, 561 P.2d 1348.

Because the District Court had already ruled, in a previous case involving the same parties, that APR was not entitled to an evidentiary hearing before the State Engineer denied an APR application to appropriate groundwater, this issue has been decided and APR is precluded from re-litigating it.

VI. The Current Application fails to provide information that is required for an application to appropriate underground water.

C. New Mexico law requires that an application to appropriate groundwater provide specific information.

1. The New Mexico Constitution provides that beneficial use is the measure of the right to appropriate groundwater.

The New Mexico Constitution establishes that the right to use water is defined by the beneficial use of the water. The Constitution provides that:

> beneficial use [is] the basis, the measure and the limit of the right to use water.

N.M. Constitution, Article XVI, §3; NMSA 1978, §72-1-2 (1941).

2. New Mexico Courts have held that an application to appropriate water must designate the beneficial use or beneficial uses for the water to be appropriated and the place or places where that use or those uses will occur.

In accordance with the Constitution, Court decisions have indicated that applications to appropriate water must specify the use to which the water will be put. *See State ex rel Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶34, 135 N.M. 375, 386, and *Carangelo v. Albuquerque-Bernalillo County Water Utility Authority*, 2014-NMCA-032, ¶35, 320 P.3d 492, 503, *cert denied*, 322 P.3d 1062.

The District Court's Decision denying the Current Application was consistent with this provision of the New Mexico Constitution and these rulings of the Supreme Court and the Court of Appeals. The District Court recognized the fundamental nature of beneficial use in the prior appropriation doctrine as well as

the need for specificity in an application to appropriate groundwater based on the Constitution. **[*RP 4752-4755 (2012 District Court Decision, pp. 26-29)*]**

3. New Mexico statutes require that specific information be provided in an application to appropriate underground water.

Section 72-12-3.A NMSA 1978 provides:

> Any person, firm or corporation or any other entity desiring to appropriate for beneficial use any of the waters described in Chapter 72, Article 12 NMSA 1978 shall apply to the state engineer in a form prescribed by him. In the application, the applicant shall designate:
> **(1)** the particular underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated;
> **(2)** *the beneficial use to which the water will be applied;*
> **(3)** the location of the proposed well;
> **(4)** the name of the owner of the land on which the well will be located;
> **(5)** the amount of water applied for;
> **(6)** *the place of the use for which the water is desired;* and
> **(7)** if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land.

NMSA 1978, §72-12-3.A, emphasis added.

The District Court correctly determined that the history of this Section indicates that the Section requires that the items listed be provided in specific detail. As the District Court stated in its 2012 Memorandum Decision:[6]

> [T]he history and purpose of the underground permitting statute, NMSA 1978 §72-12-3 (2001), underscore the requirement of an actual, specific plan to be outlined in an application.

[6] The District Court's 2012 Memorandum Decision was attached to and relied upon by the District Court's 2019 Memorandum Decision.

[*RP 4747 (2012 District Court Decision, p.21)*]

D. The Current Application fails to provide two elements required for an application to appropriate groundwater.

1. The Current Application is an application for a permit to appropriate underground water.

The Current Application is an application to appropriate underground water. **[*RP 473-635 (Current Application, pp. 1-162)*]** The Current Application proposes to extract 54,000 acre feet of groundwater a year **[*RP 474 (Current Application, p.1)*]** using 37 wells to be drilled on the Augustin Plains Ranch, near Datil in Catron County. **[*RP 487 (Current Application, Attachment 2, p.1, ¶1)*]** The Current Application therefore was required to provide the specific information designated by Section 72-12-3.A NMSA 1978, but the Current Application fails to provide two items of this required information.

2. The Current Application fails to specify the beneficial use or beneficial uses for the underground water to be appropriated.

The Current Application does not provide any specific information about the beneficial use or beneficial uses for the water to be appropriated. The Current Application contains only the following general lists of possible uses for the water to be appropriated:

- municipal and other use: commercial water sales **[*RP 474 (Current Application, p.1, ¶2)*]**;

- municipal, industrial and other users **[*RP 476 (Current Application, p.3, ¶5.g)*]**;
- municipal purposes within the authorized service areas of Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, Rio Rancho[7] **[*RP 490 (Current Application, Attachment 2, p.4, ¶5.A)*]**;
- municipal purposes and commercial sales for uses at locations along the length of the proposed pipeline **[*RP 487 (Current Application, Attachment 2, p.1, Section I)*]**; and
- bulk sales to be put to use by municipal and investor-owned utilities, commercial enterprises, and state and federal government agencies **[*RP 491 (Current Application, Attachment 2, p.5, Section III, ¶6.B)*]**.

None of these descriptions indicates the beneficial use or beneficial uses for the underground water that APR seeks to appropriate. Instead, these descriptions merely list possible uses for that water. The Current Application therefore fails to comply with Section 72-12-3.A(2) NMSA 1978. Moreover, the similar lack of specificity in the Original Application was one of the grounds for the District

[7] As noted above, two of these entities protested the Current APR Application, and the Chairwoman of another has indicated that it will not purchase water that APR appropriates from the San Agustin Basin.

Court's determination that the Original Application was deficient and should be dismissed. **[*RP 4743 (2012 District Court Decision, p.17)*]**

3. The Current Application fails to specify the place or places where the underground water to be appropriated would be put to beneficial use or beneficial uses.

The Current Application also provides only general statements about the possible place or places where the water to be appropriated would be used. The Application states that the water to be appropriated could be used:

- in "[p]arts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties " **[*RP 475 (Current Application, p.2, ¶3)*];**
- within the authorized service areas of Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo Water Utility Authority, and Rio Rancho **[*RP 476 (Current Application, p.3, ¶5.g); RP 490 (Current Application, Attachment 2, p.4, ¶5.A)*]**; and
- at locations along the length of the proposed pipeline (**[*RP 487 (Current Application, Attachment 2, p.1)*]**, which is projected to be approximately 140 miles long. **[*RP 499 (Current Application, Attachment 2, Exhibit A, p.4, Figure 6); RP 528-531 (Current Application, Attachment 2, Exhibit D, Appendix A, pp.13-16)*]**

The Current Application therefore fails to comply with Section 72-12-

3.A(6) NMSA 1978 because the Application never states the place or places where the water to be appropriated would be put to beneficial use or beneficial uses. Moreover, this was one of the grounds on which the District Court dismissed the Original Application. **[*RP 4740 (2012 District Court Decision, p.14*]**

4. The Current Application acknowledges that it fails to provide information about the beneficial use or beneficial uses for the water to be appropriated and the place or places where that beneficial use or those beneficial uses would occur.

Finally, the Current Application acknowledges that it fails to specify both the beneficial use or beneficial uses for the water that APR seeks to appropriate and the place or places where that beneficial use or those beneficial uses would occur.

The Current Application proposes a two stage hearing procedure in which the first stage consists of an evaluation of the hydrologic issues posed by the Application, including how much water can be appropriated without impairing other water rights and the effect of "enhanced recharge." **[*RP 488 (Current Application, Attachment 2, p.2)*]**

The Current Application further indicates that after an order is entered on these hydrologic issues, APR will request that it be given up to a year in which to "adjust and finalize the individual purposes of use, places of use, and amounts for each use" **[*RP 489 (Current Application, Attachment 2, p.3)*]**, and that the second

stage of the hearing would begin when APR "submits an Amended Application with additional detail regarding the types and places of use for the water." **[*Id.*]**

In addition, the Current Application proposes that Stage 2 of its two Stage process would consist of determining whether "the detailed purposes and places of use can be approved without impairment of other rights, detriment to the public welfare, or being contrary to conservation of water within the State." **[*Id.*]** The Current Application indicates as well that the "individual detailed purposes and amounts of use will be finalized in Stage 2 of the application process. **[*RP 489 (Current Application, Attachment 2, p.3, Section III.2)*]**

These proposals in the Current Application indicate that the specific beneficial use or beneficial uses for the water APR seeks to appropriate have not yet been determined as is required by Section 72-12-3.A(2) NMSA 1978. These proposals also confirm that no specific place or places for the beneficial use or beneficial uses of the water APR seeks to appropriate have been determined, as is required by Section 72-12-3.A(6) NMSA 1978.

The District Court therefore ruled correctly that the Current Application should be dismissed, just as the Original Application was dismissed, for failure to specify the beneficial use or uses for the water to be appropriated and the place or places where that use or those uses would occur. **[*See RP 4741-4752 (2012 District Court Decision, pp.15-26)*]**

VII. Contrary to New Mexico's prior appropriation law, the Current Application seeks to appropriate water for speculative purposes.

New Mexico's Constitution and laws confirm that all "unappropriated public water in this State "belong[s] to the public and [is] subject to appropriation for beneficial use," not just by a privileged few, but by everyone. New Mexico Constitution, Article XVI, §2. The requirement of beneficial use is based on "imperative necessity". *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶34, 135 N.M. 375, 386, citing *Kaiser Steel Corporation v. W.S. Ranch Company*, 1970-NMSC-043, ¶15, 81 N.M. 414, 417. This is the essence of prior appropriation, which is a system of law that "aims fundamentally at definiteness and certainty" and which "promotes the economical use of water." *Id.*

In *State ex rel Martinez*, the New Mexico Supreme Court struck down the Pueblo Rights Doctrine, which purportedly granted the Town of Las Vegas a perpetual, unlimited right to take as much water from the Gallinas River as the Town needed. The Supreme Court held that this claim could not prevail because it was wholly at odds with the law of prior appropriation. 2004-NMSC-009, ¶36, 135 N.M. 375, 387.

This point was also made in the case of *Millheiser v. Long*, 1900-NMSC-012, 10 N.M. 99. There, defendants Long and Truxton "took possession of a large ditch" that was capable of diverting the entire surface flow of the Rio Hondo in order to gain control over an entire water supply, nor for their own use, but in

hopes of selling water to third parties for profit. 1900-NMSC-012, ¶30, 10 N.M. at 116. They argued that their intent and ability to divert "all the water of the Rio Hondo" was sufficient under the law to create a right to own all of that water for the purpose of selling it to others. *Id.* Based on the principle of beneficial use, the Supreme Court disagreed:

> Under [the] construction of the law [advocated by Long and Truxton], the first person who diverts the water from the stream, may have a monopoly of all the water of any stream, by simply making this ditch large enough to conduct it from the usual channel. There need be but one appropriation, and all other settlers upon such stream must pay tribute to the person making the first diversion. *This is not the law governing water rights in this Territory where the waters of natural streams are declared to be free to those who apply them to a beneficial use, until all are thus appropriated.*

1900-NMSC-012, ¶30, 10 N.M. at 116-117, emphasis added.

Based on this analysis, the Supreme Court held that speculators could not transform the mere ability and desire to divert an entire stream into *de facto* ownership of that stream, because:

> Thus would the way for speculation and monopoly be opened and the main object of the law [of prior appropriation] defeated.

1900-NMSC-012, ¶31, 10 N.M. at 117.

A. The Current Application seeks to appropriate underground water in order to hoard it for speculative purposes.

APR's endeavor is essentially the same as Long and Truxton's effort in *Millheiser v. Long*. APR seeks to monopolize an entire water supply through its

alleged ability to extract 54,000 acre feet of underground water per year via 37 wells, just as Long and Truxton sought to monopolize the water supply in the large capacity ditch at issue in *Millheiser v. Long*. Just as Long and Truxton sought to "have a monopoly of all the water in the stream" so that "all other settlers upon such stream must pay tribute to the person making the first diversion" (1900-NMSC-012, ¶30, 10 N.M. at 116), APR seeks to monopolize the underground water in the San Agustin Basin so that APR can sell rights to use that water to others.

APR's failure to designate the specific elements of a water right in its Current Application violates the law governing applications as well as the fundamental principles of definiteness and certainty. Instead of designating a particular beneficial use in its Current Application, APR requests the State Engineer to grant it the option of selling or using water for any beneficial use. Instead of designating a particular place of beneficial use, APR requests the option of using water on its own lands or selling it to third parties for use anywhere on roughly 12 million acres.[8] As a result, the amount of water requested in the Current Application is not based on a particular need for water at a particular place,

[8] The Current Application indicates that the water to be appropriated would be used in parts of seven counties – Bernalillo, Catron, Sandoval, Santa Fe, Sierra, Socorro, and Valencia – which include a total of approximately 12 million acres.

but is instead merely a very large, arbitrary number that is based on something other than a beneficial use or beneficial uses for the water.

The speculative intent to sell water to third parties, rather than applying it to one's own use, cannot establish a water right. *Millheiser v. Long*, 1900-NMSC-012, ¶¶30-31, 10 N.M. at 116-117. Just as Long and Truxton's effort violated the law of prior appropriation and was dismissed on that basis, the Current Application also violates the law of prior appropriation, and it was properly dismissed by the District Court.

VIII. The District Court correctly dismissed the Current Application on the grounds of collateral estoppel.

The District Court's dismissal of the Current Application was based on the doctrine of collateral estoppel. The District Court determined that the elements of collateral estoppel were met because the District Court's "2012 Decision preclude[d] any argument against summary judgment being granted on the grounds of the facial invalidity of APR's 2014/2016 application [the Current APR Application]." **[*RP 4722 (2019 District Court Decision, p.5)*]**

The elements of the doctrine of collateral estoppel and a comparison of the District Court's proceeding involving the Original Application and that Court's proceeding involving the Current Application make clear that the District Court's ruling was correct.

D. The doctrine of collateral estoppel bars re-litigation of issues that have been decided.

The doctrine of collateral estoppel was explained by the New Mexico Court of Appeals in *Contreras v. Miller Bonded, Inc.*, 2014-NMCA-011, 316 P.3d 202. In its opinion, the Court of Appeals listed the four requirements that must be met for collateral estoppel to apply. The Court stated:

> [T]he moving party must demonstrate that (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

2014-NMCA-011, ¶15, 316 P.3d 207.

E. The doctrine of collateral estoppel bars approval of the Current Application.

3. The party against whom collateral estoppel is invoked was a party in the earlier proceeding.

The first requirement for collateral estoppel to apply is that the party against whom the doctrine of collateral estoppel is sought to be invoked must be the same in the two proceedings. The party against whom collateral estoppel is asserted is APR. APR was the applicant in the earlier proceeding in the District Court. **[*RP 857 (2012 State Engineer Order, p.1) and RP 4727 (2012 District Court*

***Decision, p.1)*]** APR also was the applicant in the proceeding in the District Court that is the basis for this appeal. **[*RP 474 (Current Application, p.1)*]**[9]

4. This proceeding is a separate proceeding from the proceeding addressing the Original Application.

As was explained at pages 13-14 above, the Current Application is materially identical to the Original Application in most respects, but the two Applications differ in that the Original Application proposed to use the water to be appropriated for eleven different uses, and the Current Application narrowed that to two or three uses. **[*RP 4720 (2019 District Court Decision, p.3)*]** In its 2019 Decision, the District Court pointed out that the Current Application "differed in some respects" from the Original Application. **[*RP 4719 (2019 District Court Decision, p.2)*]**, and concluded that the proceedings addressing the two Applications were different.

The District Court therefore also concluded correctly that the second requirement of collateral estoppel was met.

[9] APR also was represented in the proceedings addressing the Current Application by the same counsel – John Draper of Draper & Draper and Jeffrey Wechsler of Montgomery & Andrews – who represented APR in the proceedings addressing the Original Application.

3. The issues raised in the proceeding addressing the Current Application were actually litigated in the proceeding addressing the Original Application.

c. The Original Application was dismissed for failure to provide required information.

The third requirement for collateral estoppel to apply is that the issue involved in the current proceeding must actually have been litigated in the earlier proceeding. The issue that was litigated in the earlier proceeding addressing the Original Application was the failure of the Original Application to provide specific information required for the State Engineer to be able to approve an application to appropriate underground water. This information included the beneficial use or uses for the very large amount of underground water that APR proposed to appropriate, and the place or places where the water to be appropriated would be used. The State Engineer dismissed the Original Application because the Application failed to provide this and other information. **[*RP 859-862 (2012 State Engineer Order, pp.2-5, ¶¶5-8, 18-26)*]** That also was the basis on which the District Court upheld the State Engineer's dismissal of the Original Application. **[*RP 4741-4752 (2012 District Court Decision pp.15-26)*]**

d. The Current Application also fails to provide this required information.

Like the Original Application, the Current Application also fails to provide this information. First, the Current Application does not specify use or uses to

which the water to be appropriated would be put. The Current Application's open-ended list of possible uses of the underground water to be appropriated includes unspecified "Municipal and Other Use: Commercial Water Sales" **[*RP 474 (Current Application, p.1, ¶2)*]**, and indicates that the "water will be put to use by municipal, industrial and other users along the pipeline route shown on Exhibit D to Attachment 2." **[*RP 476 (Current Application, p.3, ¶5.g)*]** However, the Current Application never explains what these "municipal, industrial, and other users" would use the water for. **[*Id.*]**

The Current Application states as well the underground water will be used for unspecified municipal purposes within the authorized service areas of the six municipal entities listed in Attachment 2 (Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, and Rio Rancho), but the Current Application does not spell out what the uses of the water in those service areas will be. The Current Application also asserts that the water will be used for "municipal and commercial sales" along the length of APR's proposed 140 mile long pipeline **[*RP 487 (Current Application, Attachment 2, p.1, Section I)*]**, but fails to explain what particular uses would be involved in these "municipal purposes and commercial sales." **[*Id.*]** The Current Application indicates as well that the appropriated water used for bulk sales will be put to use by municipal and investor-owned utilities, commercial enterprises, and state and federal government

agencies **[*RP 491 (Current Application, Attachment 2, p.5, Section III, ¶6.B)*]**, but the Current Application does not specify what these utilities, enterprises, and agencies will use the water for. **[*Id.*]**

Second, in response to the underground water appropriation application form's request for information about the "county where water right will be used", the Current APR Application indicates "Parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties." **[*RP 475 (Current Application, p.2, ¶3)*]** The Current Application also states that the water used for unspecified municipal purposes will be put to use within the authorized service areas of six municipal entities (Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, and Rio Rancho). **[*RP 490 (Current Application, Attachment 2, p.4, ¶5.A)*]** And, in response to the application form's request for information about the "county where water right will be used", the Current Application also states "Please see Attachment for additional detail." Attachment 2 to the Current Application indicates that the appropriated water would be used for municipal purposes and commercial sales and other uses at locations along the length of the proposed pipeline. **[*RP 487 (Current Application, Attachment 2, p.1)*]** The Current Application does not specify the particular locations along the length of the proposed pipeline at which the water to be appropriated would be used. **[*Id.*]**

Thus, the District Court concluded correctly that the issues presented by the Current Application had been litigated in the proceedings concerning the Original Application.

4. The issues raised in the proceeding addressing the Current Application were necessarily determined in the earlier proceeding addressing the Original Application.

Finally, the issues in the District Court proceeding addressing the Current Application were whether the Application complied with the statutory requirements that it provide specific information about the use or uses to which the water to be appropriated would be put and where that use or those uses would occur. **[*RP 4719-4722 (2019 District Court Decision, pp.2-5)*]** These also were the issues in the State Engineer and District Court proceedings concerning the Original Application. **[*RP 858-861 (2012 State Engineer Order, pp.2-5, ¶¶5-8, 18-26); RP 4740-4758 (2012 District Court Decision, pp.14-32)*]** The issues decided in the proceedings addressing the Current Application therefore were necessarily decided in the proceedings addressing the Original Application.

Therefore the District Court correctly dismissed the Current Application based on the doctrine of collateral estoppel.

F. APR's allegations against application of the doctrine of collateral estoppel are not persuasive.

APR has presented three unpersuasive allegations for its position that the District Court should not have applied the doctrine of collateral estoppel.

1. The Current Application does not differ materially from the Original Application.

APR's assertion that the Current Application is materially different from the Original Application is based on several examples **[*BIC 31-32*]**, but none of those examples addresses the flaws common to the two Applications. The first example asserts that the Current Application includes: "a detailed plan and project description, which identifies the supply of water, the demand, the property, the projected users, and the project benefits." **[*Id., p.31*]** However, nothing in that "detailed plan and project description" specifies what the water to be appropriated will be used for or where that water will be used.

APR also asserts that the Current Application "includes a detailed pipeline route, and specifies that the place of use will be along the detailed pipeline route" **[*Id.*]**, but the proposed pipeline would be 140 miles long and the Current Application provides no information about where in those 140 miles use of the water to be appropriated will occur. Finally, APR asserts that the Current Application includes "additional information about the parts of the counties where the water will be used" **[*Id.*]**, but the only information provided is about possible places of use within the seven listed counties that include about 12 million acres of land.

Thus, there is no merit to APR's allegation that collateral estoppel cannot apply because of differences between the Original Application and the Current Application.

2. APR has alleged unpersuasively that the District Court incorrectly applied collateral estoppel to determine whether APR was entitled to an evidentiary hearing.

APR's second unpersuasive allegation is that the District Court should not have applied collateral estoppel to determine whether APR was entitled to an evidentiary hearing. **[*BIC 33-34*]**

First, the District Court never mentioned APR's claim that it was entitled to an evidentiary hearing in the Court's discussion of the collateral estoppel effect of its ruling on the Original Application. **[*See RP 4718-4723 (2019 District Court Decision, pp.1-6)*]** Second, APR's assertion that collateral estoppel does not apply to "pure questions of law" **[*BIC 33*-34]** is misplaced. If the evidentiary hearing issue had been addressed in the context of collateral estoppel, the District Court could have found that the evidentiary hearing issue was a mixed issue of fact and law. The applicable law is that an evidentiary hearing is not required for an application to appropriate underground water. The fact in issue is that the Current Application is an application to appropriate underground water.

Thus APR's allegation addressing the applicability of collateral estoppel to "pure questions of law" based on *Torres v. Village of Capitan*, 1978-NMSC-065,

92 N.M.64 is without merit. Moreover, as argued in Section V (C), *supra,* the Court of Appeals can find, under the doctrine of collateral estoppel, that APR is barred from once again arguing that it was entitled to an evidentiary hearing since it argued and lost that issue in the Original Application proceedings.

3. The District Court correctly ruled that there were no countervailing factors pertaining to the application of collateral estoppel.

There also is no merit to APR's allegation that "countervailing equities" indicate that the District Court should not have applied the doctrine of collateral estoppel. **[*BIC 35-36*]** APR's allegation is based on the flawed assertion that, having dropped its appeal from the District Court's 2012 Decision, APR was entitled to have its Current Application judged on its own merits because the Current Application met the statutory requirements for specificity of use and place of use of the water at issue.

In fact, however, the Current Application repeats the deficiencies in the Original Application; neither provides the information required by section 72-12-3.A NMSA 1978 specifying the use to which the water at issue will be put or the place where that use will occur. The District Court therefore did judge the Current Application on its own merits by ruling that the reasoning that applied to the Original Application also applied to the Current Application. The District Court

had no obligation to ignore its 2012 Decision simply because APR had filed and then dismissed an appeal of that Decision.

IX. The Community Protestants are entitled to have the Current Application dismissed with prejudice.

The District Court dismissed the Current Application with prejudice – meaning that APR cannot revive the Current Application. The District Court made it clear that "the people of New Mexico should not have their water tied up any longer with possibilities." **[*RP 4722-4723 (2019 District Court Decision, pp.5-6)*]** Indeed, the Current Application had been pending for several years before the District Court entered that order and the District Court put a clear end to the Current Application since it does not meet the requirements of the Water Code. Nothing about this dismissal with prejudice precludes APR from filing another application.

A dismissal with prejudice is appropriate when there is a complete adjudication on the merits. *See Adams v. United Steelworkers of America, AFL-CIO,* 1982-NMSC-014, ¶17, 97 N.M. 369, 373. A dismissal with prejudice would preclude the filing by APR of another application that is materially identical to the Current Application. *See Fannie Mae v. Chiulli,* 2018-NMCA-054, ¶20, 425 P.3d 739, 745. Given that APR has already filed two materially identical applications, which would have unnecessarily "tied up water" (as the District Court wrote), and consumed substantial time and resources of the appellees, including the State

Engineer, and the courts, it is appropriate to discourage yet another materially identical application through a dismissal with prejudice. If APR seeks to appropriate groundwater through a new application, which is actually different from the first two, it can do so, pursuant to Section 72-12-3 NMSA 1978.

CONCLUSION

For these reasons, the Court of Appeals should affirm the Decision of the District Court.

Dated: March 12, 2021.

NEW MEXICO
ENVIRONMENTAL LAW CENTER

gail evans

Gail Evans
Douglas Meiklejohn
1405 Luisa Street, Suite #5
Santa Fe, NM 87505
Telephone: (505) 989-9022
Facsimile: (505) 989-3769
Electronic mail: gevans@nmelc.org
dmeiklejohn@nmelc.org,

Attorneys for the Community Protestants-Appellees listed on the following page.

Attorneys for the following Protestants:

Gladys Baca; Robert and Mona Bassett; Patti BearPaw; Sue Berry-Fox; Ann Boulden; Donald and Joan Brooks; Jack Bruton and Bruton Ranch, LLC; Lisa Burroughs and Thomas Betras, Jr.; Charles and Lucy Cloyes; Michael D. Codini, Jr.; Randy Coil; James and Janet Coleman; Terri Cook; Thomas A. Cook; Wildwood Highlands Landowners Association and its members; Randy Cox; Nancy Crowley; Tom Csurilla and Elk Ridge Pass Development Company, LLC and Top of the World Land Company, LLC; Roger and Jeanne Daigger; Michael and Ann Danielson; Bryan and Beverley Dees; John and Eileen Dodds; Louise and Leonard Donahe; Patricia Eberhardt; Roy Farr; Paul and Rose Geasland; Gila Conservation Coalition, Center for Biological Diversity and Gila Watershed Alliance; Mary Rakestraw Greiert; Michael Hasson; Don and Cheryl Hastings; Gary and Carol Hegg; Patricia Henry; Catherine Hill; Eric Hofstetter; Sandy How; M. Ian and Margreet Jenness; Amos Lafon; Marie Lee; Cleda Lenhardt; Rick and Patricia Lindsey; Victoria Linehan; Owen Lorentzen; Mike Loya; Sonia Macdonald; Robert and Susan MacKenzie; Douglas Marable; Thea Marshall; Sam and Kristin McCain; Jeff McGuire; Michael Mideke; Kenneth Mroczek and Janice Przylbyl Mroczek; Peter Naumnik; John Naumnik; Regina Naumnik; Robert Nelson; Veronika Nelson; Walter and Diane Olmstead; Karl Padgett; Max Padget; Leo Padgett; Patricia Padgett; Wanda Parker; Ray and Carol Pittman; John Preston and Patricia Murray Preston; Daniel Rael; Stephanie Randolph; Mary Katherine Ray; Kenneth Rowe; Kevin and Priscilla Ryan; Ray and Kathy Sansom; Christopher Scott Sansom; John and Betty Schaefer; Susan Schudardt; Janice Simmons; Jim Sonnenberg; Anne Sullivan; Margaret and Roger Thompson; Gloria Weinrich; James Wetzig and Maureen M. MacArt; Donald and Margaret Wiltshire; and the following two associations and their members: Homestead Landowners Association and its members, including but not limited to the following: Joseph and Janet Siomiak, Patricia Germain, Bette Dugie, Jonathan Benedict, Michael Murray, John Pohl, Parker Fillion, Barbara Owens; and Abbe Springs Homeowners Association and its members, including but not limited to the following: Raven Reitstetter, Nancy Crowley, Chris and Helen Dossett, Kristin Ekvall, Kenneth and Diana Fry, Albert Goodman, William Gysin, Jeff McGuire, Rozalyn Murphy, Janice Simmons, Ronald Wilson, Paul G. Kotula, Karl and Jane Mears, Thomas and Linda Pampinella, David P. Smith, Carmela L. Warner, Lisa Burroughs, and Tom Betras.

Certificate of Service

I certify that on March 12, 2021 copies of this Answer Brief were served through the Court's Odyssey File and Serve system to the following:

Jeffrey J. Wechsler
Kaleb W. Brooks
Kari E. Olson
Montgomery & Andrews, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501
jwechsler@montand.com
kwbrooks@montand.com

John Draper
Draper & Draper
325 Paseo de Peralta
Santa Fe, NM 87501
john.draper@draperllc.com

Office of the State Engineer
Special Assistant Attorney General
Maureen C. Dolan
Gregory Ridgley
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-3824
Maureen.dolan@state.nm.us
Greg.ridgley@state.nm.us

L. Christopher Lindeen
P.O. Box 2508
Santa Fe, NM 87504
(505) 930-0665
lclindeen@gmail.com

Lorraine Hollingsworth
Pete Domenici
Domenici Law Firm, P.C.
320 Gold Avenue SW, Suite 1000
Albuquerque, NM 87102-3228
(505) 883-6250
lhollingsworth@domenicilaw.com
pdomenici@domenicilaw.com

Steffani A. Cochran
General Counsel
Pueblo of Sandia
481 Sandia Loop
Bernalillo, NM 87004
(505) 771-7981
scochran@sandiapueblo.nsn.us

Francine Jaramillo
Jaimie Park
Pueblo of Isleta
P.O. Box 1270
Isleta, NM 87022
(505) 869-9716
Francine.jaramillo@isletapueblo.com
Jaimie.park@isletapueblo.com

Adren Robert Nance
Nance Pato & Strout LLC
P. O. Box 772
Socorro, NM 87801
adren@npslawfirm.com
(575) 838-0911 ext. 801

A. J. Olsen
Jonathan Roehlk
Hennighausen & Olsen, LLP
P O Box 1415
Roswell, NM 88202-1415
(575) 624-2463
ajolsen@h2olawyers.com
jroehlk@h2olawyers.com

Daniel G. Moquin
Lisa Yellow Eagle
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Navajo Nation, AZ 86515
(928) 871-7510
dmoquin@nndoj.org
lyelloweagle@nndoj.org

Simeon Herskovits
Iris Thornton
Advocates for Community and Environment
P.O. Box 1075
El Prado, N.M. 87529-1075
(575) 758-7202
simeon@communityandenvironment.net
iris@communityandenvironment.net

Samantha Ruscavage-Barz
Daniel L. Timmons
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org
dtimmons@wildearthguardians.org

Tessa Davidson
Davidson Law Firm, LLC
P. O. Box 2240
Corrales, NM 87048
(505) 792-3636
ttd@tessadavidson.com

Veronique Richardson
Barnhouse Keegan Solimon & West
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123
vrichardson@indiancountrylaw.com

Coppler Law Firm, P.C.
John L. Appel
Frank R. Coppler
645 Don Gaspar
Santa Fe, NM 87505
(505) 988-5656
Fax: (505) 988-5704
jappel@coppler.com
fcoppler@coppler.com

gail evans

Gail Evans