BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE CORRECTED APPLICATION FILED BY AUGUSTIN PLAINS RANCH, LLC., FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN THE STATE OF NEW MEXICO	**Hearing No. 17-005** **OSE File No. RG-89943 POD 1 through POD 37**

APPLICANT'S CONSOLIDATED RESPONSE IN OPPOSITION TO THE ELC PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

MONTGOMERY & ANDREWS

Jeffrey J. Wechsler
Kari E. Olson
Kaitlyn A. Luck
325 Paseo de Peralta
Santa Fe, NM 87501
(505) 982-3873
jwechsler@montand.com
kolson@montand.com
kluck@montand.com

DRAPER & DRAPER

John B. Draper
325 Paseo de Peralta
Santa Fe, NM 87501
(505) 570-4591
john.draper@draperllc.com

Attorneys for Applicant Augustin Plains Ranch, LLC

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Response Exhibit B: Augustin's Brief in Chief

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Response Exhibit F: Court of Appeals Order (July 23, 2014) Requiring Supplemental Briefs on Whether the New Application Renders the Appeal Moot

Response Exhibit G: State Engineer's Supplemental Brief on Mootness

Response Exhibit H: Augustin's Supplemental Briefs (2) on the Issue of Mootness

Response Exhibit I: Supplemental Brief of Protestant-Appellees Demonstrating that this Appeal Is Not Moot

Response Exhibit J: Verified Petition for Writ of Mandamus and Request for Stay

Response Exhibit K: Supreme Court Order Denying Verified Petition (Oct. 27, 2014)

Response Exhibit L: Motion for Relief from this Court's Order Closing the Case (Sept. 12, 2016)

Response Exhibit M: Order Denying Motion (Sept. 22, 2016)

Response Exhibit N: Letter from J. Peterson to J. Draper (Nov. 25, 2014)

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ELC PROTESTANTS' EXHIBITS

Exhibit 1: State Engineer Order Denying Application (March 30, 2012)

Exhibit 2: District Court Order on Protestants' Motion for Summary Judgment (Jan. 2, 2013)

Exhibit 3: District Court Memorandum Decision on Motion for Summary Judgment

Exhibit 4: Selected Provisions of Answer Brief of Appellee New Mexico State Engineer (selected by the ELC Protestants)

Exhibit 5: Court of Appeals Order Dismissing Augustin's Appeal as Moot (Aug. 19, 2014)

Exhibit 6: Notice of Publication for the 2007 Application

Exhibit 7: Notice of Publication for the 2014 Application

Exhibit 8: Entry of Appearance of the Environmental Law Center

Applicant Augustin Plains Ranch, LLC ("Applicant" or "Augustin") hereby responds in opposition to the Motion for Summary Judgment filed by the Protestants represented by the New Mexico Environmental Law Center (collectively "the ELC Protestants").

INTRODUCTION

The Augustin Project seeks to appropriate a new supply of water for irrigation on its Ranch, and provide a new, and much needed, supply of water to the Middle Rio Grande. The 2014 Application was made on the form provided by the State Engineer, meets the statutory and regulatory criteria for such applications, and was accepted by the State Engineer as legally sufficient. If allowed to proceed to hearing, Augustin will be prepared to provide testimony and evidence sufficient to satisfy its burden.

Despite the contentions of the ELC Protestants, the issue presented in this Motion is *not* whether the State Engineer will grant a speculative permit that will allow monopolization – he will not. Nor is there a question as to whether it will be necessary for Augustin to establish beneficial use within a reasonable period of time after the permit is granted – it will. Rather, the issue presented is whether an applicant is required to meet its burden on the face of the application itself.

By seeking dismissal of the 2014 Application before any evidence is allowed to be presented, and before the project is considered on its merits, the ELC Protestants suggest that an application must contain all of the information necessary to prove that it should be granted. That cannot be the rule. As discussed in more detail below, the ELC Protestants' Motion should be denied because (1) the Application satisfies all statutory and regulatory requirements; (2) public policy favors consideration of the 2014 Application on its merits;

(3) dismissal of the 2014 Application at this juncture would be contrary to binding precedent that requires an evidentiary hearing; (4) the 2014 Application is consistent with the prior appropriation doctrine; (5) the ELC Protestants were provided with adequate notice; and (6) the 2014 Application is materially different from the 2007 Application.

BACKGROUND

I. Overview of the Augustin Project

1. Augustin is a New Mexico company which owns a ranch located in the San Augustin Plains near Datil, NM ("Ranch"). Augustin is seeking approval from the State Engineer for a permit to appropriate 54,000 acre-feet per year of water from 37 wells to be drilled on the Ranch. Augustin intends to deliver the water through a pipeline from the Ranch to the Albuquerque metropolitan area where the water will be used for municipal purposes and commercial sales at locations along the length of the pipeline. The Project will provide a new water resource in the most populated area of New Mexico, supplying economic and environmental benefits to the State.

II. The 2007 Application

2. On October 12, 2007, Augustin filed an Application for Permit to Appropriate Underground Water with the Office of the State Engineer ("OSE"). That Application was amended on May 5, 2008, and given OSE File No. RG-89943 ("2007 Application"). A copy of the amended 2007 Application is attached hereto as Response Exhibit A.

3. After initiation of the hearing process, on February 11, 2011, the ELC Protestants moved to dismiss the 2007 Application.

4. On March 30th, the State Engineer granted the ELC Protestants' motion to dismiss, and issued his Order Denying Application. A copy of the Order Denying Application is attached to the ELC Protestants' Motion as Exhibit 1. In that Order, the State Engineer reasoned that an application should demonstrate that the applicant "is ready, willing and able to proceed to put water to beneficial use." MSJ at Exh. 1, ¶ 18. According to the State Engineer, an application must therefore contain "sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights." *Id.* at ¶ 8.

5. Based on this rationale, the State Engineer denied the 2007 Application "*without prejudice to filing of subsequent applications.*" *Id.* at ¶ 25 (emphasis added).

III. Appeal of the State Engineer's Decision on the 2007 Application

A. Seventh Judicial District Court

6. Augustin appealed the State Engineer's Order Denying Application to the Seventh Judicial District Court. After hearing oral argument, Judge Matthew Reynolds affirmed the Order Denying Application. A copy of Judge Reynolds' Memorandum Decision on Motion for Summary Judgment is attached as Exhibit 3 to the ELC Protestants' Motion.

7. Judge Reynolds found that the 2007 Application did not adequately specify the place or purposes of use of the water because "the eleven proposed uses, in conjunction with the broad descriptions for place of use, were not sufficiently specific to allow the State Engineer to determine whether the application should be granted." MSJ at Exh. 3, pg. 15; *see also id.* 17 ("By choosing all of the named options [for purpose of use] and including several more, there was no narrowing down or selection of use in the application itself,

there was just an 'all of the above' approach."), *id.* 20 ("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."). Judge Reynolds also found that the 2007 Application "contradict[ed] beneficial use as the basis of a water right," *id.* 14, because it lacked "an actual, specific plan," *id.* 21.

8. Like the State Engineer, however, Judge Reynolds specifically noted that "[t]he dismissal without prejudice allows [Augustin] to submit an application that meets the statutory requirement of specificity for beneficial use and place of use." MSJ at Exh. 3, pg. 21.

B. New Mexico Court of Appeals

9. Augustin appealed the decision of the District Court to the New Mexico Court of Appeals on the grounds that the 2007 Application satisfied the statutory and regulatory requirements, and that Augustin was entitled to an evidentiary hearing in order to prove that it satisfied the criteria for a permit. A copy of Augustin's Brief in Chief is attached as Response Exhibit B.

10. In its Answer Brief on appeal, the State Engineer argued that, rather than filing an appeal, Augustin "could simply have submitted a new application to the State Engineer that comports with law." State Engineer's Answer Brief at 35 (a complete copy of the State Engineer's Answer Brief is attached as Response Exhibit C). Similarly, in their Answer Brief, the ELC Protestants explained that "[Augustin's] application was dismissed 'without prejudice,' meaning that it can simply file another application with the state engineer." ELC Protestants' Answer Brief at 33 (a complete copy of the ELC

Protestants' Answer Brief is attached as Response Exhibit D; for completeness, a copy of Augustin's Reply Brief is attached as Response Exhibit E).

11. Even if its appeal were successful, however, Augustin was mindful that the 2007 Application would ultimately be decided by the State Engineer. It was therefore a significant concern to Augustin that the State Engineer did not consider the 2007 Application to be sufficient. Ultimately, Augustin decided that progress on the Project would be more efficiently advanced by refiling an application that addressed the concerns of the State Engineer and the District Court. Accordingly, even though Augustin believed that its legal arguments on appeal were correct, on July 14, 2014, Augustin filed a new application to appropriate water with the State Engineer ("2014 Application," attached as Response Exhibit O).

12. Upon learning of the new application, the Court of Appeals requested supplemental briefs from the parties to "address whether the new application renders this case moot because there is no longer a controversy." Order at 1 (July 23, 2014), attached as Response Exhibit F.

13. Both Augustin and the State Engineer responded that the pending appeal was moot because, in the State Engineer's words, the "decision on the [2007 Application] [was] no longer relevant, since the State Engineer [would] review APR's new application without regard to his prior decision, just as he would review any new application to appropriate water." Appellee New Mexico State Engineer's Supplemental Brief on Mootness at 2, attached hereto as Response Exhibit G; *see also* Augustin's Supplemental Briefs on Mootness, attached hereto as Response Exhibit H.

14. The ELC Protestants disagreed. They argued that the appeal was not moot because Augustin's "'new' and old applications are materially identical, and therefore, they give rise to the same legal controversy." Supplemental Brief of Protestant-Appellees Demonstrating that this Appeal Is Not Moot, at 3, attached hereto as Response Exhibit I.

15. On August 19, 2014, the Court of Appeals sided with Augustin and the State Engineer, and dismissed the appeal as moot. Order (Aug. 19, 2014), attached to the ELC Protestants' Motion as Exhibit 5.

IV. The ELC Protestants' Unsuccessful Petition to the New Mexico Supreme Court

16. On September 22, 2014, shortly after the Court of Appeals dismissed the appeal of the 2007 Application, the ELC Protestants filed a Verified Petition for Writ of Mandamus and Request for Stay with the New Mexico Supreme Court. A copy of the Verified Petition, without exhibits, is attached hereto as Response Exhibit J.

17. In their Verified Petition, the ELC Protestants argued that "the 2014 Application is materially identical to the 2007 Application." Response Exhibit J at 1. As they do in the present Motion, the ELC Protestants contended that "[t]he State Engineer has a duty to reject the 2014 Application for the same reasons that he ultimately denied the 2007 Application – the Application expresses no present intent to appropriate water and thus cannot serve as the basis of a permit to appropriate water or a water right." *Id.* The ELC Protestants urged the Supreme Court "to order the State Engineer to promptly reject APR's application pursuant to Section 72-12-3(C) and the other authorities cited above." *Id.* 25.

18. Both Augustin and the State Engineer opposed the Verified Petition.

19. After considering the briefing and comparing the 2007 Application with the 2014 Application, on October 27, 2014, the New Mexico Supreme Court rejected the arguments of the ELC Protestants, and denied the Verified Petition. *See* Order (Oct. 27, 2014), attached hereto as Response Exhibit K.

V. The ELC Protestants' Unsuccessful Motion to Reopen the District Court Proceedings

20. Undeterred by their unsuccessful efforts before the Court of Appeals and Supreme Court, the ELC Protestants raised the same arguments again before the Seventh Judicial District Court by filing, on September 12, 2016, a Motion for Relief from the District Court's Order Closing the Case. A copy of the Motion for Relief is attached hereto as Response Exhibit L.

21. In that motion, the ELC Protestants yet again asserted that the 2014 Application "is essentially identical" to the 2007 Application, Response Exhibit L at 3, and that the 2014 Application suffered from "the same defects that caused the Court to reject the [2007 Application] in [its] Memorandum Decision," *id.* 2. For those reasons, the ELC Protestants asked the District Court to re-open the case "so that they [could] request that this Court enforce its Memorandum Decision and order the State Engineer to reject [the 2014 Application]." *Id.*

22. Judge Reynolds did not wait for a response to the Motion for Relief. Instead, on September 22, 2016, he rejected the ELC Protestants' arguments and issued an order denying the ELC Protestants' Motion for Relief. A copy of the Order Denying Motion is attached as Response Exhibit M.

VI. The 2014 Application

23. As discussed above, *supra* ¶ 11, Augustin initially filed its new application on July 14, 2014. In submitting its new application, Augustin carefully studied the guidance given by both the State Engineer and the District Court. In the new application, Augustin followed that guidance and addressed the concerns expressed. A description of the ways in which Augustin addressed the concerns of the State Engineer and the District Court, as well as a summary of the ways in which the 2014 Application is different from the 2007 Application is contained in Argument, Section IV.

24. On November 25, 2014, the OSE informed Augustin that it would not accept the new application because it was not complete and did not conform with the applicable legal requirements. *See* Letter from J. Peterson to J. Draper (Nov. 25, 2014), attached hereto as Response Exhibit N. As required by regulation, the OSE provided a description of the changes that were required to the application. *See* 19.27.1.11 NMAC. Specifically, the OSE identified the following changes that were necessary for the application to be deemed complete:

a. Remove offsets as a purpose of use since the application was for a new appropriation;

b. Include information on the municipal entities where water will be used for municipal purposes; and

c. Identify the specific industrial or commercial enterprise and location where water will be used for industrial or commercial purposes.

25. The OSE also explained that if Augustin "seeks to engage in commercial water sales, then the other proposed uses should be deleted from the Application." The

OSE continued that "[i]f APR's intent is to appropriate water for commercial water sales, please provide a legal description of the area(s) in which it plans to conduct commercial sales, and a description of the distribution system, delivery points, and methods of delivery to end users." Response Exh. N at 1-2. Augustin was directed to resubmit the application within 30 days.

26. Augustin resubmitted its corrected application on December 23, 2014 ("2014 Application"). A complete copy of the 2014 Application is attached as Response Exhibit O. Augustin addressed each of the issues identified in the November 25th letter by removing offsets, industrial, and commercial as purposes of use, more specifically identifying the location where the water will be used for municipal purposes, including commercial sales as a purpose of use, and by including the additional information requested for commercial sales.

27. On August 12, 2016, the State Engineer determined that the 2014 Application "conform[ed] to the requirements of the statutes and rules and regulations of the state engineer." 19.27.1.11 NMAC. It therefore accepted the 2014 Application and issued notices for publication. *See* MSJ at Exhibit 7; 19.27.1.12 NMAC.

28. In evaluating the 2014 Application, the State Engineer was aware of the previous dispute on the 2007 Application, and applied the standard identified in his Order Denying Application. It follows that by accepting the 2014 Application, the State Engineer concluded that the 2014 Application contains "sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights," MSJ at Exh. 1, ¶ 8, and that Augustin is "ready willing and able to proceed to put water to beneficial use," *id.* ¶ 18.

29. The OSE prepared and issued notices of publication pursuant to 19.27.1.11 and 19.27.1.12 NMAC. Based on OSE's approved notice, Augustin caused legal notice of the 2014 Application to be published in the *Santa Fe New Mexican, the Albuquerque Journal*, the *Valencia County News-Bulletin*, the *Socorro El Defensor Chieftain*, the Truth or Consequences *Herald*, and the *Silver City Daily Press and Independent*. Affidavits of Publication were filed with the WRD.

30. Following the publication of notice of the 2014 Application, numerous protests were filed with the State Engineer. 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.

31. The Hearing Examiner issued a Scheduling Order on August 10, 2017 setting forth the deadlines for disclosure of witnesses, exhibits, motions, and for the hearing in this matter.

VII. Progress on the Augustin Project

32. Augustin has undertaken significant steps to establish and develop its Augustin Plains Ranch Water Production and Distribution Project ("Project"), which is the basis for the 2014 Application, including spending significant money and resources drilling two test wells and one borehole, conducting pump tests, conducting initial analyses of the aquifer, developing a preliminary groundwater model, evaluating the project's preliminary engineering and cost estimates, conducting a routing analysis for the pipeline, holding discussions with all major water users in the Middle Rio Grande, making public

presentations to all interested stakeholders, evaluating the economic and financial feasibility, and working with several infrastructure investors. *See* Exh. A to Att. 2 to the 2014 Application, attached as Response Exhibit O. In short, these steps establish that Augustin is ready, willing, and able to undertake the pipeline project and put the applied-for water to beneficial use.

STANDARD OF REVIEW

Although the ELC Protestants contend that the summary judgment standard applies, the standard should be the same as that applied by courts to motions to dismiss under Rule 1-012(B)(6) of the New Mexico Rules of Civil Procedure. The ELC Protestants are requesting the denial of the Application, without an opportunity to be heard on the merits, which is akin to a dismissal of a complaint under Rule 1-012(B)(6) NMRA for failure to state a claim. The ELC Protestants' motion requesting summary judgment is a misnomer because there are no facts set forth in the motion and no affidavits or exhibits attached. For the following reasons, Augustin requests the motion and this response be considered under the appropriate standard for motions to dismiss.

A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint and is properly granted only "when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Envtl. Improvement Div. of the New Mexico Health and Env't Dep't v. Aguayo*, 1983-NMSC-027, ¶ 10, 99 N.M. 497, 660 P.2d 587. A court deciding a Rule 12(B)(6) motion looks only at the facial validity of the complaint, accepting all well-pleaded facts as true. Pursuant to that rule, the ELC Protestants bear the burden of establishing that there is no set of facts under which Augustin could proceed to hearing. *See Rummel v. Edgemont Realty Partners, Ltd.*, 1993-NMCA-

085, ¶ 9, 116 N.M. 23, 859 P.2d 491 ("A compliant is subject to dismissal under Rule 1-012(B)(6) only if under no state of facts provable thereunder would a plaintiff be entitled to relief . . . "). A motion to dismiss "is infrequently granted because its purpose is to test the law of the claim, not the facts that support it." *Nass-Romero v. Visa U.S.A. Inc.*, 2012-NMCA-058, ¶ 6, 279 P.3d 772 (internal citations and quotation marks omitted). Dismissal "is *only* proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Id.* (internal citations and quotation marks omitted). The same policy favoring adjudication on the merits underlies the standards governing motions for summary judgment and motions to dismiss: "Our established policy requires that the rights of litigants be determined by adjudication on the merits rather than upon the technicalities of procedure and form." *Armijo v. Ed Black's Chevrolet Ctr., Inc.*, 1987-NMCA-014, ¶ 11, 105 N.M. 422, 733 P.2d 870. Thus, in reviewing the Application, the State Engineer must "accept as true all well-pleaded factual allegations in the [Application] and resolve all doubts in favor of the [Application's] sufficiency." *Id.* (citation and internal quotation marks omitted).

Applications to appropriate groundwater are authorized by statute, and it is the relevant statutory provisions, as well as the OSE regulations implementing those provisions, that dictate the information required to constitute a facially valid application. When applied to an application to appropriate groundwater, the Rule 12(B)(6) standard requires that the State Engineer assume that all the facts stated in the application are true and ask whether the application satisfies the statutory requirements. With respect to the 2014 Application, the State Engineer must assume that the Augustin intends to, can, and will drill the wells in the locations identified in the Application, appropriate the specified

amount of water from the aquifer, construct a pipeline, and put the water to beneficial use. Only if, after assuming all of these facts as true, the State Engineer determines that the Application fails to otherwise comply with the statutory criteria, can the Application be dismissed. As discussed below, the Application meets the statutory requirements, and is not subject to dismissal at this stage in the proceedings.

ARGUMENT

I. The 2014 Application Satisfies All Statutory and Regulatory Requirements

A. The 2014 Application Complies with the Governing Law

For their first argument, the ELC Protestants argue that the State Engineer was required to reject the 2014 Application because it "fails to include information that is required by the New Mexico Constitution and applicable New Mexico statutes and regulations." MSJ at 4. This argument necessarily turns on the language of the Constitution and relevant statutes.

For its part, the New Mexico Constitution provides that water is "subject to appropriation for beneficial use." N.M. Const. Art. XVI, § 2. Rather than detail the information required to be in an application, however, the Constitution specifies that appropriations shall be "in accordance with the laws of the state." It is therefore necessary to look to the statutes and regulations to determine what information must be included in an application to appropriate groundwater.

The State Engineer is an administrative officer whose office is created by statute. NMSA 1978, § 72-2-1 (1982). As such, his authority is derived from statute and "limited to the power and authority expressly granted or necessarily implied by . . . statutes." *Tri-State Generation & Transmission Ass'n, Inc.*, 2012-NMSC-039, ¶ 13, 289 P.3d 1232. As

the ELC Protestants acknowledge, the basic law governing the sufficiency of an application for a permit to appropriate underground water is NMSA 1978, Section 72-12-3 (2001). *See* MSJ at 5, 7, 9 10, 11, and 12.

Section 72-12-3 requires an applicant to state seven facts relating to the water proposed to be appropriated:

> (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.

Section 72-12-3(A). Subsection B provides further requirements if the applicant is not the owner of the land where the well will be located. Section 72-12-3(B).

In addition to prescribing the information to be provided in a groundwater application, Section 72-12-3 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." Section 72-12-3(C). "Applications which are defective as to form or fail to comply with the rules and regulations" are "returned promptly to the applicant with a statement of the changes required." 19.27.1.11 NMAC. After being notified of required changes, the applicant is given thirty (30) days to refile the application and the OSE will process it with the same priority date as the original filing date. *Id.* Upon

receipt of an application that "conforms to the requirements of the statutes and regulations," the OSE prepares and issues a notice of publication, the applicant publishes the notice, and the time for filing protests begins. 19.27.1.12 NMAC; *see also* § 72-12-3(D).

After notice is published, the State Engineer must consider the application on its merits. Section 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. Section 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. Section 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"). If the State Engineer denies the application without a hearing, he is still required to hold an evidentiary hearing if the applicant so requests. *Aguayo*, 1983-NMSC-027. *See* NMSA 1978, § 72-2-16 (2015) (requiring hearing before appeal and providing that "[i]f, 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"); *Derringer v. Turney*, 2001-NMCA-075, ¶ 9, 131 N.M. 40, 33 P.3d 40, *cert. denied*, 131 N.M. 64 , 33 P.3d 284 (2001). The State Engineer's regulations state that "hearings shall be conducted" in the event an application is protested. 19.27.1.15 NMAC.

Protestants make the unsupported assertion that the 2014 Application is facially "invalid" because it fails to include information necessary for a groundwater application. Specifically, the ELC Protestants contend that the 2014 Application fails to "designate a beneficial use," MSJ at 5, fails to "designate a specific point of diversion of water, MSJ at 9, and "fails" to "provide sufficient information for the State Engineer" to determine whether it will cause impairment, be detrimental to conservation or detrimental to the public welfare, MSJ at 10-11. As discussed below, however, a comparison of the 2014 Application to the relevant law reveals that the ELC Protestants' assertion is incorrect, and the 2014 Application provides significantly more information than the statutory and regulatory minimum. *See* Argument, Section IV.

1. Overview of the 2014 Application

The Corrected 2014 Application was completed using OSE Form wr-05, and it contains all of the information requested on that form. It is 162 pages long, including 148 pages of substantive attachments. Among other information, the 2014 Application includes:

- An overview of the Project, including a description of the work undertaken thus far (hydrologic, engineering, stakeholder involvement, and financial), the purpose and amount of water, the Counties where the water will be used, the places of use for both municipal purposes and commercial sales, and a description of the distribution system, delivery points, and methods of delivery (Attachment 2 to the Application);
- A detailed Project Description outlining the business model, demand and uses of the water (Exhibit A to Attachment 2);
- Letters indicating financial feasibility (Exhibit B to Attachment 2);
- A map of the points of diversion (Exhibit C to Attachment 2);
- A detailed Routing Analysis from SWCA Environmental Consultants describing the pipeline route, which evaluates the environmental, cultural,

and land ownership issues, and which provides detailed, mile-by-mile information on the pipeline route and elevation (Exhibit D to Attachment 2);

- Letters of interest from municipal users in the Middle Rio Grande indicating demand (Exhibit E to Attachment 2);

- Sample a long-term sales agreement, an infrastructure participation agreement and other agreements that will be entered with end-users (Exhibit F to Attachment 2); and

- A Conceptual Engineering Design from CH2M Hill (Exhibit G to Attachment 2)

In sum, the 2014 Application goes far beyond the minimum information required to be provided pursuant to Section 72-12-3 – it is not an exaggeration to say that it is among the most detailed applications ever filed with the OSE.

2. The Underground Basin

Subsection 72-12-3(A)(1) requires an applicant to specify the particular underground basin from which the water will be appropriated. The 2014 Application meets this requirement by identifying the aquifer underlying the Augustin Plains Ranch as the underground basin from which the water will be appropriated. The ELC Protestants do not assert that the 2014 Application fails to satisfy Subsection 72-12-3(A)(1).

3. Beneficial Uses

Subsection 72-12-3(A)(2) requires an applicant to specify the beneficial use to which the water will be applied. Unlike the 2007 Application, the 2014 Application only identifies two beneficial uses: municipal and commercial sales. Both are long recognized beneficial uses in New Mexico and throughout the west. *See, e.g.*, Response Exhibit N; *Trujillo v. CS Cattle Co.*, 1990-NMSC-037, 109 N.M. 705, 790 P.2d 502 (recognizing sale as a beneficial use); *Albuquerque Land & Irrigation Co. v. Gutierrez*, 1900-NMSC-017, ¶

4, 10 N.M. 177, 61 P.d 357 ("[i]t seems to us to be equally well settled that it is not necessary that the company diverting, carrying, delivering and distributing water for such purpose shall be itself a consumer, provided that the water, when so carried and distributed, shall, within a reasonable time, be applied to a beneficial use"), *aff'd Gutierres v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545 (1903); *Curry v. Pondera County Canal & Reservoir Co.*, 370 P.3d 440, 449 (Mont. 2016) (recognizing sale as a beneficial use); S.C. Weil, Water Rights in the Western States, 2d ed., §120, p. 198 ("Mining and power are useful purposes for which appropriation may be made. Sale or public supply likewise.") (internal citations omitted).

Nor do the ELC Protestants argue that municipal uses or commercial sales are improper uses. Rather, they baldy claim that the 2014 Application "does not provide any definite information about the use to which the water to be appropriated would be put." MSJ at 7. It is not clear, however, what additional information the ELC Protestants would have the State Engineer require about the beneficial uses of the water. The ELC Protestants claim that the 2014 Application does not "indicate that the water will be used for a specific purpose or at a specific location." MSJ at 9. This is incorrect. As specified in the 2014 Application, the water will be used for municipal purposes in the municipalities listed on page 4 of Attachment 2, and the water will be used for commercial sales along the detailed pipeline route provided in Exhibits D and G to Attachment 2. Response Exh. O at Exhibits D and G to Attachment 2. As explained in Attachment 2, Augustin "intends to put the full amount of applied-for water to beneficial use within a reasonable amount of time pursuant to the prior appropriation doctrine and applicable statutes and regulations." Response Exhibit O at Attachment 2, pg. 3. These statements, accepted as true for purposes of

determining the legal adequacy of the 2014 Application, meet the legal requirement of beneficial use. *See Nass-Romero*, 2012-NMCA-058, ¶ 6 (noting that court reviewing order of dismissal must "accept as true all well-pleaded factual allegations in the complaint and resolve all doubts in favor of the complaint's sufficiency") (citation and internal quotation marks omitted).

The ELC Protestants further suggest that the 2014 Application should be dismissed because it "fails to indicate a specific location where the water would be used or who the user of the water would be." MSJ at 7; *see also* Cuchillo Valley Joinder at 3 (asserting that the 2014 Application should be denied because it "does not identify any specific user or entity that would beneficially use water"). This argument is remarkably similar to the argument that was rejected by the New Mexico Supreme Court in *Mathers v. Texaco, Inc.*, 1966-NMSC-226, 77 N.M. 239, 421 P.2d 771. The *Mathers* protestants, like the ELC Protestants, argued that the application at issue in that case was required to be rejected because it sought "to appropriate water from the [] Underground Water Basin in gross and fail[ed] to set forth a specific industrial entity or owner for which and in which the water rights sought to be appropriated can vest." *Id.* at ¶ 24. The Court rejected that argument, explaining that "Certainly there is nothing in our law which requires that an application to appropriate public waters for a beneficial use must be made by or in the names of all persons who may ultimately use or be benefited by such use." *Id.* ¶ 30; *see also Albuquerque Land & Irrigation Co. v. Gutierrez*, 1900-NMSC-017, ¶ 65, ("the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made through some other person, and upon lands and possession other than those of the appropriator"); *Scherck v. Nichols*, 95 P.2d 74, 78 (Wyo.

1939) (cited favorably in *Mathers*, 1966-NMSC-226 at ¶ 30) (an applicant "may initiate an appropriation for the future use of another"). That same reasoning applies in the present case. The 2014 Application specifically identifies two beneficial uses for the water, and the Hearing Examiner should reject the ELC Protestants' suggestion that it is deficient.

4. Location of Proposed Wells

Subsection 72-12-3(A)(3) requires that an application specify the location of the proposed well. The State Engineer's regulations require that the well locations be described to the nearest forty (40) acre subdivision. 19.27.1.11 NMAC. Attachment 1 to the 2014 Application identifies thirty-seven (37) well locations by quarter section, latitude, and longitude. The 2014 Application also provides a map showing the precise location of each proposed well within Applicant's property. The well-location information satisfies the statutory and regulatory requirements.

The ELC Protestants argue that the 2014 Application should be dismissed because it designates 37 wells instead of a single well. MSJ at 9-10. The ELC Protestants cite no precedent for this position, and Augustin is aware of none. Indeed, the ELC Protestants argument that 37 separate applications were required flies in the face of common sense and principles of efficiency. It is not surprising, then, that it is a common and accepted practice for applicants to list multiple points of diversion on the same application. For example, the standard form of OSE Attachment 1 for groundwater applications explicitly contemplates multiple wells. The ELC Protestants' argument that 37 applications were required should be summarily rejected.

5. Owner of the Land Where the Wells Will Be Located

Subsection 72-12-3(A)(4) requires that an application give the name of the owner of the land on which the well will be located. The 2014 Application clearly shows that all of the proposed thirty-seven wells will be located on Applicant's property. This statutory criterion is therefore satisfied, and the ELC Protestants do not argue otherwise.

6. Amount of Water

Subsection 72-12-3(A)(5) requires that an application set forth the amount of water applied for. The Application specifies an amount of 54,000 acre feet of water, and therefore meets this statutory requirement.

7. Place of Use

Subsection 72-12-3(A)(6) requires an applicant to identify the place of use for which the water is desired. The 2014 Application meets this requirement by identifying the general places of use as areas within Catron, Sierra, Socorro Valencia, Bernalillo, Sandoval, and Santa Fe Counties situated within the geographic boundaries of the Rio Grande Basin. Extant statutes define each of the seven counties identified, with a description of each county by legal subdivision. *See* NMSA 1978, §§ 4-1-1 to -2 & Compiler's notes (Bernalillo County), § 4-23-1 (Sandoval County), § 4-26-1 (Santa Fe County), § 4-2-1 (Catron County), § 4-27-1 (Sierra County), § 4-28-1 (Socorro County), § 4-32-1 (Valencia County). The State Engineer's regulations further define and describe the Rio Grande Basin and include maps showing the location of the Rio Grande Basin within each of the seven counties identified in the Application, complete with township and range designations. 19.27.49 NMAC. The Application's designation of places of use within the seven counties thus provides a short-hand description of the township and range

where the water is proposed to be used. In New Mexico, notice is sufficient where a reasonable inquiry would reveal the pertinent facts. *See Bogan v. Sandoval County Planning & Zoning Comm'n*, 1994-NMCA-157, ¶ 24, 119 N.M. 334, 890 P.2d 395. The boundaries of the Rio Grande Basin and the counties identified in the Application are definite, publicly known, and legally recognized, and the Application's description of the place of use provides sufficient information to allow interested parties to identify the legal subdivision where the water will be put to use.

Moreover, the 2014 Application further defines the place of use by specifying that water will be used for municipal purposes in six particular municipalities. Each of those municipalities is specifically identified by the place of use defined in their respective permit. *See* Response Exhibit O at Attachment 2, pgs. 3-5 (identifying the places of use of OSE File Nos. RG-3501, RG-537, RG-17065, RG-960 (as modified), and RG-6745). The 2014 Application also specifies that customers for commercial sales "will connect to the pipeline and use water along the route presented in Exhibit D." Exhibit D contains a detailed routing description of the pipeline, including X and Y coordinates, elevation, and mile-by-maps of the place of use. In addition, Exhibit G includes a map illustrating the place of use for sales, and figures showing specific tie-in locations.

8. The Land to Be Irrigated

The ELC Protestants complain that the 2014 Application "does not identify land to be irrigated." MSJ at 13. That is correct. Augustin has not identified any land to be irrigated, and has not identified irrigation as a purpose of use, because it does not intend to use any of the applied-for water for irrigation. Accordingly, the ELC Protestants' argument

that the 2014 Application should be dismissed for failure to identify the lands to be irrigated, MSJ at 13-14, should be disregarded in its entirety.

In sum, the 2014 Application sets forth each of the elements required by Section 72-12-3 in detail, and is therefore complete on its face.

B. The State Engineer Has Already Determined that the 2014 Application Is Complete

For their next argument, the ELC Protestants claim that the 2014 Application "does not provide sufficient information" to enable the State Engineer to evaluate whether the 2014 Application satisfies the statutory criteria for granting a permit. MSJ at 9-11. There are two problems with this argument.

First, the State Engineer has already determined that the 2014 Application is complete and that it contains all the necessary information. As described above, Section 72-12-3 provides that "[n]o application shall be accepted by the state engineer unless it is accompanied by all of the information required" by the statute. Section 72-12-3(C). If, as the ELC Protestants allege, the 2014 Application were defective, the OSE would have been required to reject it and to notify Augustin of the deficiencies. The OSE would have then had to allow Augustin thirty (30) days to correct those deficiencies and refile the application. 19.27.1.11 NMAC. Indeed, the 2014 Application already went through this very process, when, after Augustin submitted its application in July of 2014, the State Engineer returned the application and requested further information. Augustin supplied the additional information and modified its application, and the State Engineer thereafter determined that the 2014 Application was complete and "conforms to the requirements of the statutes and regulations." 19.27.1.12 NMAC.

Given the extensive regulatory history on this project, the acceptance of the 2014 Application bears great significance. Both the State Engineer and the Seventh Judicial District Court articulated the standard that would be applied to the 2014 Application. It follows that, contrary to the ELC Protestants' argument, by accepting the 2014 Application, the State Engineer concluded that the 2014 Application contains "sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights," MSJ at Exh. 1, ¶ 8, and that Augustin is "ready willing and able to proceed to put water to beneficial use," *id.* ¶ 18.

Second, neither 72-12-3 nor the applicable regulations require all possible information to be included in an application as the ELC Protestants suggest. As discussed above, Augustin used OSE Form wr-05 for its 2014 Application, and attached a lengthy description with 148 pages worth of information as attachments. Despite this extensive information, the ELC Protestants are still not satisfied, and seek to move the goal post again. They contend that Augustin was required to provide even more – including far more information than is required by the statute, the regulations and the OSE forms. But a similar argument has already been rejected by the New Mexico Supreme Court in *Mathers*. *Mathers*, 1966-NMSC-226 In that case, the protestants similarly claimed that the application was defective because it should have included information beyond what was required by Section 72-12-3 and the OSE. The Court noted:

> The applications were made on forms furnished and prescribed by the State Engineer; they were made by and in the name of Texaco, Inc. as applicant; they designate the underground basin from which the water is proposed to be appropriated; they designate the beneficial use to which it is proposed to apply such water; they designate the location of the proposed wells, they name the owner of the lands on which the wells will be located; they designate the amount of water applied for; and they designate the use for which the water is desired.

1966-NMSC-226, at ¶ 25. It went on to reject the protestants' claim and hold that "the applications were in proper form." *Id.* at ¶ 31. Like the applicant in *Mathers,* Augustin utilized "forms furnished and prescribed by the State Engineer," and like the application in *Mathers*, the 2014 Application is "in proper form." The Hearing Examiner should reject the ELC Protestants' argument.

C. All Other Determinations Must Be Made After the Evidentiary Hearing

As explained in Augustin's briefing before the Court of Appeals, Response Exhibits B and E, which is hereby incorporated by reference, 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, as requested by the ELC Protestants. *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 31, 147 N.M. 523, 226 P.3d 622.

The State Engineer's charge under the Water Code 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 Sections 72-2-16 and 72-2-17. 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. Section 72-2-16; 19.25.4.8 NMAC.

An applicants' 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. *Derringer*, 2001-NMCA-075, ¶ 13 ("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."). As New Mexico courts have recognized, "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." *D'Antonio v. Garcia*, 2008-NMCA-139, ¶ 9, 145 N.M. 95, 194 P.3d 126 (emphasis added).

Section 72-2-17 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 have a record transcribed, on request, of all oral proceedings, and to have facts decided based exclusively "on the evidence and on matters officially noticed." Section 72-2-17(B)(3) - (6). Moreover, the Court of Appeals has rejected the contention that the Section 72-2-16's hearing

requirement "can be satisfied solely by the written pleadings of the parties," as suggested by the ELC Protestants' Motion for Summary Judgment. *Derringer*, 2001-NMCA-075, ¶ 15.

The purpose of the evidentiary hearing before the OSE is to adduce evidence and information beyond what is printed in the application, including detailed evidence and analysis as to "whether there is in fact a demand for the amount of water requested for appropriation," MSJ at 11, how the water applied for will be put to beneficial use, MSJ at 7-9, the impact of return flows, Pueblos' Joinder at 2, and the analysis of conservation measures, MSJ at 11. Many of those subjects will require expert calculations and testimony. A Scheduling Order has already been adopted to facilitate the presentation of evidence. Only after hearing all of the evidence can the State Engineer properly decide the issues of non-impairment of existing rights, conservation of water, and absence of detriment to the public welfare. *See Albuquerque Bernalillo County Water Util. Auth. v. N.M. Public Regulation Comm'n*, 2010-NMSC-013, ¶ 18, 148 N.M. 21, 229 P.3d 494 (emphasizing that court reviewing the whole record "must be satisfied that the evidence demonstrates the reasonableness of the decision") (citation and internal quotation marks omitted); *see also Lion's Gate Water*, 2009-NMSC-057, ¶ 31 (recognizing, in regard to application for permit to appropriate new surface water that "[o]nly when the State Engineer makes an initial determination that water is unavailable to appropriate is the State Engineer . . . 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 . . . .*") (emphasis added).[1]

II. The 2014 Application is Consistent with the Prior Appropriation Doctrine

In part II.H-J of their Argument, MSJ at 18-24, the ELC Protestants argue that the 2014 Application "must be dismissed because it seeks to monopolize water for speculative purposes." *Id.* at 18. As shown below, this argument should be rejected.

A. The 2014 Application Seeks to Appropriate Water for Beneficial Use

The ELC Protestants argue the 2014 Application should be dismissed because the appropriation would be "based on something other than a beneficial use for the water." MSJ at 21. Contrary to the ELC Protestants' argument, however, the 2014 Application is consistent with the doctrine with appropriation. Under that doctrine, beneficial use need not be established until a reasonable time after a permit is granted.

It is undisputed that the priority of a water right is established as of the date of filing of an application to appropriate water. Priority is not tied to the time that a water right is put to beneficial use; rather, priority "relates back" to the initiation of the right by the first overt act or the filing of the application: "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." *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 35, 135 N.M. 375, 89 P.3d 47 (citation and internal quotation marks omitted). The relation-back principle thus recognizes 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; *see Snow v.*

[1] To hold otherwise would require an applicant to include significant additional information in an application, such as a hydrologic analysis, that is not required by statute or regulations.

Abalos, 18 N.M. 681, 694, 140 P. 1044, 1048 (1914) ("The 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 . . . ."); *Farmers Dev. Co. v. Rayado Land & Irrigation Co.*, 28 N.M. 357 (1923). In this way the doctrine of appropriation affords an applicant security in his investment by preserving his priority while he takes the necessary steps to obtain a permit, construct the works, and put the water to beneficial use. *See Yeo v. Tweedy*, 34 N.M. 611, 614, 286 P. 970, 971 (1929) (explaining that under the prior appropriation doctrine "[i]nvested capital and improvements are . . . protected"). As the Wyoming Supreme Court has expressed:

> Relation back has always been a flexible doctrine generally used to protect the parties' expectations when an unexpected event occurs. Its application in water law has been necessary to stimulate investment in water development. As it was initially developed, relation back was applied to small ditches and less complex means of water development. Considerable delays in putting water to use suggested speculation and could result in loss of early priority. However, contemporary water projects often entail extended planning, financing, and construction lead times, and, without application of the relation back doctrine, the security of the project's water right could be undermined.

In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 48 P.3d 1040, 1049 (Wyo. 2002) (internal citations omitted).

Rather than the 2014 Application, it is the ELC Protestants' position, that conflicts with the doctrine of appropriation. Neither the statutes nor the doctrine of appropriation imposes a requirement to show on the face of the application that the applicant is immediately prepared to divert water, particularly for a large project, such as this one, that requires significant infrastructure. "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." *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 48 P.3d at 1049 (citing 94 C.J.S. *Waters* § 365 (2001)).

It follows from the relation-back principle that every evidentiary detail necessary to support a request for a permit need not appear on the face of the application. The 2014 Application in this case initiated the adjudicative process in which Augustin bears the burden of presenting evidence to establish it is entitled to a permit. As the ELC Protestants have previously acknowledged, the 2014 Application itself manifests the claimant's intent to appropriate, and priority relates back to the filing date. Just as the 2014 Application was adequate to put interested parties on notice of Augustin's request for a permit, it was adequate to establish priority of Augustin's right if—and only if—it succeeds in obtaining a permit. Augustin's priority of right stands or falls with its showing on the merits. Augustin should have the opportunity to make such a showing.

B. The ELC Protestants' Allegations of Monopolization and Speculation Are Unfounded

The ELC Protestants assert that Augustin seeks to "hoard [water] for speculative purposes," MSJ at 21, and "monopolize an entire water supply," MSJ at 22. This argument should be rejected because the ELC Protestants assume facts not in evidence in contravention of the governing standard of review, and ignore the express contents of the 2014 Application.

It is uncontroversial that the State Engineer may refuse to allow or recognize an appropriation that is motivated by an intent to monopolize or speculate. MSJ at 18-24. The ELC Protestants charge Augustin with just such improper intent, asserting or implying

that Augustin's intent is "to monopolize an entire water supply" for "speculative purposes," and "to play 'dog in the manger.'" *Id.* at 20. The ELC Protestants' accusations are not based on evidence, however, but on bare assumption. Such assumptions fail to support the ELC Protestants' Motion because they are not based on the 2014 Application or any evidence presented by the ELC Protestants to the Hearing Examiner. To the contrary, in reviewing the ELC Protestants' Motion, the Hearing Examiner should "accept as true all well-pleaded factual allegations in the [Application] and resolve all doubts in favor of the [Application]'s sufficiency." *Nass-Romero*, 2012-NMCA-058, ¶ 6 (citation and internal quotation marks omitted).[2] Questions of intent, such as an alleged intent to monopolize or speculate, are especially unsuitable for resolution without an evidentiary hearing because such questions are for the fact finder to decide on the basis of the evidence. *Maxey v. Quintana*, 84 N.M. 38, 42, 499 P.2d 356, 360 (Ct. App. 1972); *see Juneau v. Intel Corp.*, 2005-NMSC-002, ¶ 27, 139 N.M. 12, 127 P.3d 548 (emphasizing that "summary judgment is not an appropriate vehicle" for weighing evidence and judging credibility of witnesses relating to allegations of wrongful intent).

The cases cited by the ELC Protestants actually undermine the contention that a claim of speculation can justify the dismissal of an application without an evidentiary hearing. For example, in *Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 566-69 (Colo. 1979), the speculative nature of the right at issue was found only *after* one or more evidentiary hearings or trials. *See also, e.g., Millheiser v. Long*, 10 N.M. 99, 100-02, 61 P. 111, 111-12 (N.M. Terr. 1900) (appeal from district court

[2] Similarly, in ruling on Protestants' motion for summary judgment, the Court "view[s] the facts in a light most favorable to the party opposing the motion and draw[s] all reasonable inferences in support of a trial on the merits." *Moongate Water Co.*, 2012-NMCA-003, ¶ 26 (citation and internal quotation marks omitted).

judgment after trial); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1131-32 (10th Cir. 1981) (appeal from district court after trial); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 21-22 (Colo. 1996) (en banc) (appeal from water court's decree after 57-day trial).

As explained above, it follows from *Lion's Gate Water*, 2009-NMSC-057, ¶¶ 25-27, and other controlling precedent, that once a groundwater application has been accepted for filing and publication, "the State Engineer must consider the full merits of an application." *Id.* at ¶ 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"). 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.*

Nor does the New Mexico Supreme Court's repudiation of the pueblo water rights doctrine in *State ex rel. Martinez v. City of Las Vegas,* which is relied upon by Protestants, have any relevance to the validity of the Application. *See* MSJ at 18-19. The pueblo water rights doctrine was abandoned because it allowed an ever-expanding water right, unlinked to beneficial use. 2004-NMSC-009, ¶¶ 33-43. Nothing in *Martinez* suggests, however, that an application to appropriate groundwater should be summarily dismissed on the basis of a protestant's allegations that it manifests an intent to speculate in sales of the water.

The ELC Protestants' reliance on *Millheiser v. Long,* 1900-NMSC-012, 10 N.M. 99, is similarly misplaced. *Millheiser* stands for the unremarkable proposition that the capacity of a ditch alone, without beneficial use, does not establish a water right. But that longstanding principle has no bearing on the 2014 Application because Augustin does not seek to define its right based on the size of its pipeline. Rather, as Augustin has made clear, it "intends to put the full amount of applied-for water to beneficial use within a reasonable amount of time pursuant to the prior appropriation doctrine and applicable statutes and regulations." Response Exh. O at Attachment 2, pg. 3.

Finally, as discussed in detail above, the 2014 Application specifically sets out the details of Augustin's proposed appropriation, including the amount, type of use, and place of use. Contrary to the ELC Protestants allegation that Augustin "seeks to monopolize an **entire water supply**," MSJ at 22 (emphasis added), the 2014 Application does not seek to appropriate "all the unappropriated groundwater of the San Augustin Basin" as, for example, the Bureau of Reclamation did with respect to the waters of the Rio Grande in 1908. *See* Supplemental Notice by the United States of Water Appropriation for the Rio Grande Project (Letter from Louis C. Hill, Reclamation Service Supervising Engineer, to Vernon L. Sullivan, Territorial Engineer of New Mexico (April 28, 1908)) (notice of intent to utilize "All the unappropriated water of the Rio Grande and its tributaries" pursuant to New Mexico statute requiring U.S. notification of its intention "to utilize certain specified waters" for its projects). Rather, the 2014 Application asks for a specific amount (54,000 AFY), which bears an as-yet undetermined relation to "the entire water supply" of the San Augustin Basin.

C. A Central Goal of Water Administration in New Mexico Is to Maximize the Beneficial Use of Water

It has long been a central goal of water administration in New Mexico to maximize beneficial use of water and not to allow this valuable resource to be left unused. Our Supreme Court has made this clear:

> [W]ater was placed in a unique category in our Constitution—something that cannot be said of lumbering, coal mining, or any other element or industry. The reason for this is of course too apparent to require elaboration. Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. *Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.*

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 34, 135 N.M. 375, quoting *Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, ¶ 15, 81 N.M. 414 (emphasis added).

This policy is also supported by Article XVI, section 2 of the New Mexico Constitution, which provides:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be *subject to appropriation for beneficial use*, in accordance with the laws of the state. (emphasis added).

See also Yeo v. Tweedy, 1929-NMSC-033 (applying section 2 to groundwater). The thrust of the provision is to make it a bedrock principle of New Mexico law that the public waters of groundwater aquifers are subject to appropriation by private or public individuals "in accordance with the laws of the state." This supports the policy of maximum utilization articulated by the Supreme Court.

The ELC Protestants' position is directly at odds with this strong policy of prior maximization of waters in our State. Protestants claim that Augustin "seeks to appropriate water in order to hoard it for speculative purposes." MSJ at 21. Yet, in actuality, it is the ELC Protestants who seek to "hoard" the groundwater of the San Augustin Basin by preventing its appropriation by other citizens. They show no interest in putting the water that Augustin is applying for to beneficial use – they want it to stay unused in the ground. The ELC Protestants' position is close to the position of riparian users who insist that water not be taken from the lands where it is located, a position that has been repeatedly rejected, including by Judge Federici in *Cartwright v. Public Service Co.*, 1958-NMSC-134, 66 N.M. 64, where he said that one of the reasons for adopting the doctrine of prior

appropriation was "to prohibit the monopoly inherent in the riparian doctrine." *Cartwright v. Public Service Co.*, 1958-NMSC-134, ¶ 129, 66 N.M. 64, 107 (Federici, J. dissenting) quoted by the ELC Protestants at MSJ 19. This is not a controversy between two sets of water users, one of whom will put the resource to beneficial use, as was the case in *Millheiser v. Long*, 1900 –NMSC-012, 10 N.M. 99, or as it was in *Cartwright v. Public Service Co.*, 1958-NMSC-134, 66 N.M. 64, two cases discussed extensively by Protestants. Rather, the question here is between water being put to beneficial use pursuant to the 2014 Application and water *not* being put to beneficial use *at all*.

The 2014 Application provides an opportunity to put the groundwater of the San Augustin Basin to beneficial use, something that won't happen if the ELC Protestants succeed in having the application dismissed.

D. Appropriate Conditions Can Be imposed by the State Engineer

Unlike in the Colorado water courts, the process established by the governing statutory scheme is inherently flexible, and allows the State Engineer to tailor a permit in light of all of the evidence. For example, the State Engineer can issue a permit to appropriate only "part of" the waters for which an applicant has applied. § 72-12-3(E). He may also choose to impose conditions on any permit granted. Protestants' concerns can be fully addressed by appropriate conditions on the permit ensuring timely application to beneficial use. Indeed, such a condition is routinely included in State Engineer permits. If other conditions are proven necessary, those can also be imposed in the final permit. *See, e.g., City of Albuquerque v. Reynolds*, 71 N.M. 428, 439, 379 P.2d 73 (1963) (confirming the authority of the State Engineer to impose conditions to avoid impairment of prior rights).

III. The Office of the State Engineer Required Sufficient Notice for the 2014 Application

Protestants' argument that the 2014 Application must be dismissed for failure to give the ELC Protestants meaningful notice of the 2014 Application, is meritless.

A. The Published Notice Provided Reasonable Notice and an Opportunity to Be Heard

In *Albuquerque Bernalillo County Water Util. Auth.*, 2010-NMSC-013, ¶ 21, our Supreme Court explained that "it is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense." The Court continued that "[g]eneral notice of the issues to be presented at a hearing is sufficient to comport with due process requirements." *Id.* ¶ 21. *See also Bogan v. Sandoval County Planning & Zoning Comm'n*, 119 N.M. 334, 341, 890 P.2d 395, 402 (Ct. App. 1994) ("The standard for adequate notice requires that the average citizen reading the notice be fairly informed of the general purpose of what is being considered."). The notice of the 2014 Application prepared by the State Engineer and published by Augustin comports with this requirement. *See* MSJ at Exh. 7.

Section 72-12-3(D) and its implementing regulations require the State Engineer, upon receipt of an acceptable application that conforms to the requirements of the statutes, rules, and regulations of the State Engineer, to cause notice of the application to be published in a newspaper in the county where a well will be located and in each county where the water will be or has been put to beneficial use or where other water rights may be affected. Section 72-12-3(D); 19.27.1.11, 19.27.1.12 NMAC; *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2011-NMCA-015, ¶ 9, 149 N.M. 394, 249 P.3d 932, *cert. granted*, 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129. Consistent with this rule,

the OSE prepared and issued notices for publication of the 2014 Application that specified the location of the wells, the place of use, and the types of uses to which the water will be applied. *See* MSJ at Exh. 7. The notice further identified the procedure for submitting a protest of the application to the State Engineer, and clarified that previously filed protests or objection to the 2007 Application would be considered "timely for this corrected application and notice of publication." *Id.* Augustin duly published this notice in newspapers distributed in both the county where the wells are to be located and the counties where the water will be put to beneficial use or where other water rights may be affected. *Id.* That publication provided all water rights holders with notice of the 2014 Application sufficient to comport with due process requirements. *See Albuquerque Bernalillo County Water Util. Auth.*, 2010-NMSC-013, ¶ 21.

B. The Attorney General's Opinion on the State Engineer's Dedication Policy Is Not Analogous

The ELC Protestants nonetheless claim that the published notice of the 2014 Application was insufficient and deprived the ELC Protestants of due process. MSJ at 15-17. The ELC Protestants make this argument by attempting to analogize the 2014 Application to the State Engineer's former dedications program. That is a faulty analogy.

Under the dedications program, the State Engineer routinely approved groundwater appropriations that would impact surface flows, so long as the applicant agreed to subsequently retire unidentified surface rights. In a 1994 opinion, the Attorney General opined that this policy was unlawful. The issue that the Attorney General found with respect to the dedications program was not that the information being supplied regarding rights to be retired was too vague or speculative; rather, the State Engineer was not requiring *any* information with regard to those rights. *See* 1994 WL 721625,

*4-*5 (N.M.A.G.). In other words, the problem was not applications that otherwise set forth the elements required by the statute but were still somehow insufficient and vague, as alleged by the ELC Protestants. Instead, the problem was that none of the statutory elements had to be specified for the rights to be retired in the future,. The program was found invalid because the State Engineer was accepting and granting such applications in the absence of the information required by statute. *See id.* at *4 ("[S]ince the public notice describes only the new permit application and not the surface water rights to be retired, the public is never notified of a key part of the transaction and cannot meaningfully participate in the process."). In contrast, the 2014 Application, and thus the notice, contains the information required by the statute. It therefore did not suffer from the same problems, and was sufficient to give notice to potentially affected water right holders. The reasoning behind the Attorney General's invalidation of the State Engineer's former dedication program simply does not apply in this case.

C. **The ELC Protestants Had Actual Notice of the 2014 Application**

The ELC Protestants' notice argument fails for the additional reason that the fact they filed a timely protest to the 2014 Application and are actual participants in this hearing establishes they had actual notice.

"The standard for adequate notice requires that the average citizen reading the notice be fairly informed of the general purpose of what is being considered." *Bogan v. Sandoval Planning Comm'n*, 1994-NMCA-157, ¶ 24, 119 N.M. 334, 890 P.2d 395. As stated in *Bombach v. Battershell*, 1987-NMSC-031, ¶21, 105 N.M. 625, "[i]t is a somewhat ludicrous assertion to make, when one files [a pleading], and appears for hearing, that he

has not been properly served." *See also Storm Ditch v. D'Antonio*, 2011-NMCA-104, ¶ 23, 150 N.M. 590, 263 P.3d 932 ("[E]ven if notice by publication was somehow inadequate, the actual telephone notice received by a Storm Ditch commissioner four days before the protest deadline would be sufficient to satisfy any constitutional requirement.").

The ELC Protestants do not contend, and the evidence would not support, an argument that the notice of publication has impeded them from actively opposing the 2014 Application at every stage of the proceedings. To the contrary, the fact that ELC Protestants are parties to this proceeding and have the opportunity to conduct discovery, challenge the evidence submitted by Applicant, and present any contradictory evidence, if any, establishes that the notice ELC Protestants received must have been sufficient to satisfy due process requirements. For example, in *Hawthorne v. City of Santa Fe*, 1975-NMSC-033, ¶¶ 6-8, 88 N.M. 123, 537 P.2d 1385, the New Mexico Supreme Court addressed an objection to compliance with a statutory notice provision where the objector had not received notice as provided in the statute, but had nonetheless participated in the process. The court rejected the argument that "failure to give notice in strict compliance" with the statute was reversible error. *Id.* Instead, the Court reasoned that the purpose of the notice "is to apprise interested parties of the hearing" so that they may participate. *Id.* Because the objector had actual knowledge of the hearing, the court found that there was "substantial compliance" with the statute in question. *Id.*

That same reasoning applies in the present case. As previously demonstrated, notice was provided in strict compliance with Section 72-5-4. If, however, the State Engineer finds otherwise, then the ELC Protestants nonetheless had actual notice of the 2014 Application, and have filed their protest. *See National Council on Compensation Ins.*

v. New Mexico State Corp. Comm'n, 1988-NMSC-036, ¶ 22, 107 N.M. 278, 756 P.2d 558 (stating that "if, in addition to statutory notice, a party had actual knowledge of the details to be inquired into at the hearing, that would support the reasonable conclusion that there was no violation of procedural due process."). As in *Hawthorne*, the purpose of the notice provisions in the Underground Waters Act is to ensure that water rights owners can evaluate the 2014 Application and determine whether they should protest to protect their interests. The published notices accomplished this purpose. The ELC Protestants cannot reasonably argue that they did not receive notice of the Application, and they cannot reasonably argue that they have been deprived of due process at this stage of the proceedings. In light of the actual notice received, the State Engineer should decline the ELC Protestants invitation to dismiss the Application at this premature date.

To the extent that ELC Protestants are attempting to argue on behalf of hypothetical third parties who did not file a protest, the ELC Protestants claim is barred for the additional reason that they lack standing to raise such a claim. *See, e.g., N.M. Gamefowl Ass'n v. State ex rel. King*, 2009-NMCA-088, ¶¶ 28-29, 146 N.M. 758 (holding that plaintiffs lacked standing to assert claims on behalf of absent third parties).

IV. The Prior Decisions on the 2007 Application Do Not Require Dismissal of the 2014 Application

The ELC Protestants' "second alternative theory of dismissal" states that because the 2014 is materially identical to the 2007 Application, the doctrines of law of the case, res judicata and collateral estoppel mandate dismissal of the 2014 Application for the same reasons the 2007 Application was dismissed. As discussed below, there are at least three problems with this argument. First, the two Applications are materially different. As such,

the legal issue in this proceeding is not the same issue previously decided, and law of the case, res judicata or collateral estoppel do not apply. Second, res judicata and collateral estoppel should not be applied where the State Engineer and District Court have expressly stated that the dismissal of the 2007 does not bar Augustin from filing a corrected application. Third, the ELC Protestants' argument has already been rejected by the Court of Appeals, the Supreme Court, and the District Court.

A. The 2014 Application Is Materially Different from the 2007 Application

The 2014 Application is a valid new application that is materially different from the 2007 Application. The ELC Protestants "second alternative theory of dismissal," that the doctrines of law of the case, res judicata, collateral estoppel require dismissal of the 2014 Application rest on the underlying factual assumption that Augustin's 2014 Application is materially identical to the 2007 Application. This premise is demonstrably incorrect.

First, as discussed above, no application can be accepted by the State Engineer unless all of the information required by Subsection A of 72-12-3 accompanies the application. Section 72-12-3(C). Thus, the acceptance of the 2014 Application means that the State Engineer determined that the Application includes the information required by Section 72-12-3(A), and further demonstrates that the State Engineer determined that the substantive changes to the 2014 Application cured the perceived deficiencies noted in the State Engineer's Order Denying Application. MSJ at Exh. 1, ¶¶ 8-23. Simply put, the State Engineer found the two Applications were not the same, and as demonstrated below, they are not.

Prior to drafting and submitting the 2014 Application, Augustin carefully studied the guidance from both the State Engineer and District Court, and the 2014 Application reflects its conscientious and determined effort to address those concerns. Three examples are helpful to demonstrate this effort. *First*, both the State Engineer and the District Court found that the 2007 Application was problematic because of "great uncertainty as to where Applicant's pipeline would go." MSJ at Exh. 3, pg. 17. To address this issue, in the 2014 Application Augustin included a detailed routing study of the pipeline, including mile-by-mile maps of the pipeline route. Response Exh. O at Exhibit D to Attachment 2. *Second*, the District Court found that Augustin needed to present "an actual specific plan to be outlined in an application." MSJ at Exh. 3, pgs. 21, 27. In the 2014 Application, Augustin provided significant additional information, including a detailed Project Description. Response Exh. O at Exhibit A to Attachment 2. *Third*, while the District Court recognized that an application could include multiple purposes of use, MSJ at Exh.3, pgs. 16-17, it criticized Augustin for listing all of the possible purposes of use, MSJ at Exh. 3, pgs. 20-21. To address this issue, in the 2014 Application, Augustin refined its plan, eliminating all but two purposes of use, and removing irrigation on the Ranch as one of the proposed uses of water. Response Exh. O at 2, 5(g).

A side-by-side comparison of the two applications reveals that the 2014 Application contains numerous substantive changes and significant additional information. *Compare* Response Exhibit O, *with* Response Exhibit A. For example:

- Unlike the 2007 Application, the 2014 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.

- Unlike the 2007 Application, the 2014 Application includes a detailed pipeline route, and specifies that the place of use will be along the detailed pipeline route.

- Unlike the 2007 Application, the 2014 Application includes two letters of support from a municipal end user.

- Unlike the 2007 Application, the 2014 Application includes additional information about the parts of the counties where the water will be used.

- Unlike the 2007 Application, the 2014 Application does not include the Ranch as a place of use.

- Unlike the 2007 Application, the 2014 Application does not include a request to use the water for domestic, livestock, irrigation, industrial, or commercial purposes.

- Unlike the 2007 Application, the 2014 Application includes a request to use the water for commercial sales, and includes significant information about the place of use for those sales.

- Unlike the 2007 Application, the 2014 Application does not include compliance with the Rio Grande Compact as a purpose of use.

- Unlike the 2007 Application, the 2014 Application includes information about the hydrologic investigation and studies that have already been completed.

- Unlike the 2007 Application, the 2014 Application includes information about the engineering investigation and studies that have already been completed.

- Unlike the 2007 Application, the 2014 Application includes information about the stakeholder involvement that has already taken place.

- Unlike the 2007 Application, the 2014 Application includes information about the financial viability and feasibility of the project.

- Unlike the 2007 Application, the 2014 Application includes information about the investment to date in the project.

- Unlike the 2007 Application, the 2014 Application includes a request for approval of an enhanced recharge project.

- Unlike the 2007 Application, the 2014 Application includes a description of the type of business arrangements through which Augustin intends to deliver water, and includes sample forms of a Short Term Sales Agreement, a Long Term Sales Agreement, an Infrastructure Participation Agreement.

- Unlike the 2007 Application, the 2014 Application includes a conceptual design and description of the distribution system, delivery points, and methods of delivery to end users.

- Unlike the 2007 Application, the 2014 Application includes a request for approval of a 2-stage hearing process.

In view of these differences between the two applications, it is not credible for the ELC Protestants to assert that the 2014 Application is "identical in all material respects" to the 2007 Application.

Nor is it relevant that the 2014 Application and 2007 Application overlap in some respects. Given the fact that both Applications relate to the same proposed project, it is to be expected that both Applications would have some similarities.[3] That is particularly true in this case, where Augustin was intentionally attempting to improve its previous application to address the concerns of the State Engineer and Court.

In sum, the relevant inquiry is not whether the 2014 Application and 2007 Application have some similarities, but whether the two are "materially identical" as argued by the ELC Protestants. Because they are not, the Hearing Examiner should deny the ELC Protestants' Motion.

[3] Augustin notes that several of the Points of Diversion locations listed in the 2007 Application were subsequently corrected and resubmitted to the State Engineer as part of a "replacement Attachment 1" thus defeating the argument that the Points of Diversion in the 2007 Application are identical to the 2014 Application. *Compare* Response Exh. A, *with* Response Exh. O at Attachment 1.

B. The Prior Decisions of the State Engineer and District Court Have No Preclusive Effect on the 2014 Application.

Law of the case, collateral estoppel, and res judicata are legal doctrines designed to prevent re-litigation of a previously decided issue. *Cordova v. Larsen*, 2004-NMCA-087, ¶ 10, 136 N.M. 87, 94 P.3d 830. "The doctrine of law of the case . . . relates to litigation of the same issue recurring within the same suit." *Alba v. Hayden*, 2010-NMCA-037, ¶ 7, 148 N.M. 465, 237 P.3d 767. *See also Cordova*, 2004-NMCA-087, ¶ 10 ("Under the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent in successive states of the same litigation."). Collateral estoppel, on the other hand, is used where the identical issue is raised in two different suits. *See Torres v. Village of Capitan*, 1978-NMSC-065, ¶ 16, 92 N.M. 64, 582 P.2d 1277 ("The doctrine of collateral estoppel . . . applies to identical issues in two suits where the same parties are involved in both suits even though the subject matter or cause of action in the second is different from the first. Collateral estoppel applies to prevent the re[-]litigation, as between the parties, of ultimate facts or issues actually and necessarily decided by the prior suit."). Finally, "res judicata bars re[-]litigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits." *Alba*, 2010-NMCA-037, ¶ 6.

These preclusion doctrines cannot be applied to dismiss Augustin's 2014 Application for at least three reasons. *First*, the doctrines of law of the case, collateral estoppel, and res judicata do not apply where the legal and factual issues are not identical. As demonstrated above, the State Engineer's action to dismiss the 2007 Application and accept the 2014 Application, in conjunction with the substantive differences between the two applications, establishes that the two Applications, although relating to the same

project, are materially different. Because the information contained in the respective applications differs, the analysis of whether that information is sufficient under Section 72-12-3 to support the State Engineers acceptance of the Application is not the same. Where the issues are not identical, law of the case, collateral estoppel, and res judicata are inapplicable, and the prior rulings have no preclusive effect.

Second, the doctrine of law of the case is inapplicable to this proceeding for the independent reason that this proceeding is not part of the "same suit" as the 2007 Application. *See Alba*, 2010-NMCA-037, ¶ 7. The district court's order denying Augustin's Motion to Dismiss and Remand to State Engineer and the district court's subsequent order denying Protestants' motion to reopen the case provide indisputable confirmation that the previous case dismissing the 2007 Application was closed. *See* Order filed February 8, 2016, ¶ 7 ("there is nothing further for this Court to do in this matter, and the case is closed."). *See also* Order Denying Motion filed September 22, 2016 (stating, "it is therefore ordered that Protestants/Appellees' motion for relief from this court's order closing this case is denied and the case will remain closed."). As such, this cannot be considered a continuation of that proceeding.

Finally, the dismissal of the 2007 Application was explicitly "without prejudice to filing a new application." MSJ at Exh. 1, ¶ 25. The intention was expressly to "allow" Augustin "to submit an application that meets the statutory requirement of specificity for beneficial use and place of use." MSJ at Exh. 3, pg. 21. In the words of the ELC Protestants, Augustin was free to "simply file another application with the state engineer." Response Exhibit D at 33.

It is settled law that "[when] the court in the first action has expressly reserved the plaintiff's right to maintain the second action . . . the general rule . . .does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant." Restatement (Second) of Judgments § 26(1)(b) (1982). In light of the express recognition that Augustin was permitted to amend and resubmit an application that "meets the statutory requirement[s]," the ELC Protestants position cannot be sustained. *See, e.g., Bralley v. City of Albquerque*, 1985-NMCA-043, ¶ 18, 102 N.M. 715, 699 P.2d 646 ("The words without prejudice when used in an order or decree generally indicate that there has been no resolution of the controversy on its merits and leave the issues in litigation open to another suit as if no action had ever been brought."); *Semtek International Inc. v. Lockheed Martin Corp.* 531 U.S.497 (2001) ("[t]he primary meaning of 'dismissal without prejudice,'. . . is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim"); *Marquez v. Juan Tafoya Land Corp.*, 1981-NMSC-080, ¶ 9, 96 N.M. 503, 632 P.2d 738 ("a dismissal without prejudice contemplates the right to further proceedings.").

C. The ELC Protestants' Position Has Been Rejected by the Court of Appeals, the Supreme Court, and the District Court

This motion marks the ELC Protestants' fourth attempt to dismiss the 2014 Application on the theory that the 2014 Application is "materially identical to the 2007 Application."

The argument was first rejected by the Court of Appeals in its Order dismissing Augustin's Appeal. The ELC Protestants asserted that "the new application is not new. It is in all material respects identical to the application under appeal" in response to the Court's Order requesting parties to submit supplemental briefing addressing the effect of

the new application on the pending appeal. *See* Response Exh. I at pgs. 2-4. The Court of Appeals, finding ELC Protestant's position unpersuasive, issued an order dismissing the appeal as moot. *See* MSJ at Exhibit 5.

Unsatisfied with that result, the ELC Protestants next asserted the same argument to the New Mexico Supreme Court as part of a Verified Petition for Writ of Mandamus and Request for Stay. *See* Response Exhibit J at pg. 1 ("The 2007 and 2014 Applications…describe the same speculative project in which APR seeks to monopolize a tremendous amount of public water."); Response Exh. J at Page 3 ("The State Engineer has a non-discretionary duty to deny the 2014 Application for the same reasons that the District Court held that he had no choice but to reject the 2007 Application.") (quotations omitted). The Court, after requesting responses to the petition for writ of mandamus and request for stay, issued an order denying the petition, implicitly rejecting the position advanced by the ELC Protestants. *See* Response at Exh. K.

The ELC Protestants raised the argument for a third time in a motion to the District Court requesting relief from its order closing the case. As they had previously, the ELC Protestants argued that "[t]he Ranch's amended application has been filed with the New Mexico State Engineer…and, even though the Ranch's amended application has the same defects that caused both the State Engineer and this Court to reject the Ranch's original application…the State Engineer has authorized publication…. The Protestants seek to have this matter re-opened so that they can request that this court enforce its Memorandum Decision and order the State Engineer to reject the Ranch's Amended Application". Response at Exh. L, pg. 2. Without waiting for a response from Augustin, the district court issued an order denying the motion. *See* Response at Exh. M.

The ELC Protestants, undeterred by the holdings of the Court of Appeals, Supreme Court and District Court, now assert the same argument for the fourth time in the pending motion. The actions of the Court of Appeals, the New Mexico Supreme Court, and the district court make clear that the argument has no basis in law or the facts of this case. The Hearing Examiner should follow the direction of the courts and deny the ELC Protestants' Motion.

V. Consideration of the 2017 Application on the Merits Is in the Public Interest

Last, sound public policy favors consideration of the 2014 Application on its merits. New Mexico is an arid state that has recently experienced long-term droughts. In fact, New Mexico routinely faces severe water shortages. Water shortages, in turn, are a limiting influence on the State's economy and growth. The Middle Rio Grande is both the economic center of the State and New Mexico's fastest-growing area. Approximately 60 percent of the State's population resides in the Middle Rio Grande, and, as shown by data from the recent Census, is continuing to increase.

Few places in New Mexico have unallocated surface or groundwater available for new uses, and the potential for obtaining new supplies through infrastructure development is limited. Moreover, the 1919 Rio Grande Drainage Report estimates that there were approximately 102,500 acre-feet of pre-1907 consumptive-use surface water rights at that time. Some of those rights may have been abandoned. WRD has estimated that approximately 21,000 acre-feet from that total surface water amount has been transferred to groundwater. Current groundwater permits require approximately 37,000 acre-feet of surface water to be transferred for offsetting purposes. That leaves a relatively small amount of water available for transfer in the Middle Rio Grande to satisfy the needs of a

growing population. In short, growth has outpaced the availability of water in New Mexico.

The result is competition for a limited supply of available water. This competition leads to rapidly increasing prices. Moreover, the Middle Rio Grande is faced with increasing pressures to convert agricultural water use to urban use, as well as difficulties in meeting the State's Compact obligations.

Given the conflicting realities of limited availability of water and expanding populations in New Mexico, it is particularly important for the State Engineer to evaluate innovative and non-conventional projects on their merits for three reasons. First, New Mexico law favors determination of disputes on their merits rather than on blind compliance with alleged technical deficiencies. *See, e.g., Transamerica Ins. Co. v. Sydow*, 97 N.M. 51, 54, 636 P.2d 322, 325 (Ct. App. 1981) (New Mexico courts "require that the rights of litigants be determined by an adjudication on the merits rather than upon the technicalities of procedure and form"); *Bennett v. City Council for City of Las Cruces*, 1999-NMCA-015, ¶ 7, 126 N.M. 619, 973 P.2d 871 ("Our Supreme Court has held that 'substantial compliance' with notice and publication is sufficient to satisfy statutory requirements"). This is particularly true in the present matter where granting the Motion would result in the denial of the 2014 Application, but denying the Motion would not impact any existing rights. No rights would be impacted, because denying the Motion would simply permit Augustin to proceed to hearing to present its evidence. At that stage, the State Engineer would be in a better position to evaluate whether the Augustin Project satisfies the statutory criteria for a new appropriation.

Second, public policy favors allowing applications to be considered on their merits because it is in the public interest to enable growth and economic development. There is frequently opposition to innovative projects from groups or individuals intent on clinging to the status quo. But the State cannot be paralyzed by those interests. For example, there was stiff opposition to the San Juan Chama project when it was originally proposed. Fortunately for the State, the project overcame the opposition, because that water has become essential to New Mexico.

Third, the opposition need not be concerned about the impact of the Augustin Project on their rights because the laws governing new appropriations requires Augustin to establish that the 2014 Application will not cause impairment, will not be detrimental to the public welfare, and will not be detrimental to conservation. NMSA 1978, § 72-12-3. But that showing is best made at a hearing. Moreover, the Augustin Project has the potential to provide a new and important source of water to the Middle Rio Grande. Because it is a potential new source, that water would not be converted from existing agriculture, and it should help alleviate the market-driven high prices. And because it is a privately funded project, the State would not be responsible for the cost of infrastructure.

In sum, public policy favors consideration of applications on their merits. The Motion should be denied, and Augustin should be allowed to present its evidence to the State Engineer.

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment should be denied.

Respectfully submitted,

MONTGOMERY & ANDREWS

Jeffrey J. Wechsler
Kari E. Olson
325 Paseo de Peralta
Santa Fe, NM 87501
(505) 982-3873
jwechsler@montand.com
kolson@montand.com

John B. Draper
DRAPER & DRAPER
325 Paseo de Peralta
Santa Fe, NM 87501
(505) 570-4591
john.draper@draperllc.com

Attorneys for Applicant Augustin Plains Ranch, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2017, a copy of the foregoing was sent via U.S. Mail to all Parties Entitled to Notice as located on the Office of the State Engineer's website, http://www.ose.state.nm.us/HU/AugustinPlains.php, revised 10/20/17.

I further certify that on October 30, 2017, a copy of the foregoing was sent via electronic mail to the following parties:

Maureen C. Dolan
Felicity Strachan
Office of the State Engineer
Administrative Litigation Unit
P.O. Box 25102
Santa Fe, NM 87504-5102
Maureen.Dolan@state.nm.us
Felicity.Strachan@state.nm.us

Attorneys for Water Rights Division

Abramowitz Franks & Olsen
c/o Martha C. Franks, Esq.
P.O. Box 1983
Fort Collins, CO 80522-1983
marthacfranks@earthlink.net

Attorneys for Water Rights Division

Douglas Meiklejohn
Jaimie Park
Jon Block
Eric Jantz
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
dmeiklejohn@nmelc.org

Attorneys for the ELC Protestants

Tessa Davidson
Davidson Law Firm, LLC
P.O. Box 2240
Corrales, NM 87408
ttd@tessadavidson.com

Attorneys for the Hand Protestants

David Mielke
Sonosky, Chambers, Mielke & Brownell
500 Marquette Avenue NW
Suite 660
Albuquerque, NM 87102
dmielke@sonosky.com

Attorneys for the Pueblo of Isleta

Jeffrey Albright
Lewis Roca Rothgerber Christie LLP
201 Third Street, NW
Suite 1950
Albuquerque, NM 87102-3228
jalbright@lrrc.com

Attorneys for Kokopelli Ranch, LLC

Pete Domenici, Jr.
Lorraine Hollingsworth
Domenici Law Firm, P.C.
320 Gold Ave., SW, # 1000
Albuquerque, NM 87102-3228
pdomenici@domenicilaw.com
lhollingsworth@domenicilaw.com

Attorneys for Catron County Board of County Commissioners and 5 Additional Protestants

Jane Marx
2825 Candelaria Road NW
Albuquerque, NM 87107
janemarx@earthlink.net

Attorneys for Pueblo of Zuni & Pueblo of San Felipe

Adren Nance
Nance, Pato & Stout, LLC
P.O. Box 507
Reserve, NM 87505
adren@npslawfirm.com

Attorneys for Catron County Board of County Commissioners

John L. Appel
Coppler Law Firm, P.C.
645 Don Gaspar
Santa Fe, NM 87505
jappel@coppler.com

Attorneys for City of Truth or Consequences

Peter Thomas White
125 E. Palace Ave., #50
Santa Fe, NM 87501-2367
Pwhite9098@aol.com

Attorneys for Cuchillo Valley Community Ditch Association and Salomon Tafoya

James C. Brockmann
Stein & Brockmann PA
P.O. Box 2067
Santa Fe, NM 87504-2067
jcbrockmann@newmexicowaterlaw.com

Attorneys for Last Chance Water Co.

A.J. Olsen
Jonathan E. Roehlk
Hennighausen & Olsen LLP
P.O. Box 1415
Roswell, NM 88202
ajolsen@h2olawyers.com
JRoehlk@h2olawyers.com

Attorneys for Pecos Valley Artesian Conservancy District

Jessica R. Aberly
Aberly Law Firm
2222 Uptown Loop NE, #3209
Albuquerque, NM 87110
aberlylaw@swcp.com

Attorneys for Pueblo of Sandia

Samantha M. Ruscavage-Barz
Wildearth Guardians
516 Alto Street
Santa Fe, NM 87501
sruscavagebarz@wildearthguardians.org

Attorneys for Wildearth Guardians

Wayne G. Chew
P.O. Box X
Albuquerque, NM 87103
wgchew@wgchewlaw.com

Attorneys for Apache Ranch – Kenneth R. Brumit

Alvin F. Jones
Olivia R. Mitchell
Hennighausen & Olsen, LLP
P.O. Box 1415
Roswell, NM 88202
ajones@h2olawyers.com
omitchell@h2olawyers.com

Attorneys for New Mexico Farm & Livestock Bureau and Catron County Farm & Livestock Bureau

Navajo Nation Department of Justice
c/o M. Kathryn Hoover, Esq.
c/o Lisa Yellow Eagle, Esq.
Water Rights Unit
P.O. Drawer 2010
Window Rock, AZ 86515
khoover@nndoj.org
Lyelloweagle@nndoj.org

Attorneys for Navajo Nation

Kim Bannerman
New Mexico Interstate Stream Commission
P.O. Box 25102
Santa Fe, NM 87504-5102
kim.bannerman@state.nm.us

Attorneys for the NMISC

Richard Mertz
Associate University Counsel
1 University of New Mexico
Albuquerque, NM 87131-0001
Rmertz159@gmail.com

Attorneys for University of New Mexico

Veronique Richardson
Karl E. Johnson
Johnson Barnhouse & Keegan LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
vrichardson@indiancountrylaw.com
kjohnson@indiancountrylaw.com

Attorneys for Pueblo of Santa Ana

Advocates for Community & Environment
c/o Simeon Herskovits, Esq.
c/o Iris Thornton, Esq.
P.O. Box 1075
El Prado, NM 87529
simeon@communityandenvironment.net
iris@communityandenvironment.net

Attorneys for San Augustin Water Coalition (SAWC)

Jeffrey J. Wechsler