BEFORE THE STATE ENGINEER

STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION BY AUGUSTIN PLAINS RANCH, LLC FOR A PERMIT TO APPROPRIATE GROUND WATER IN THE RIO GRANDE UNDERGROUND WATER BASIN OF NEW MEXICO	)))))	Hearing No. 17-00509-096 OSE File No. RG-89943

THE COMMUNITY PROTESTANTS' CONSOLIDATED REPLY TO THE AUGUSTIN PLAINS' RANCH'S RESPONSE AND THE WATER RIGHTS DIVISION'S RESPONSE TO THE COMMUNITY PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This Consolidated Reply is filed by the Protestants represented by the New Mexico Environmental Law Center (the Community Protestants).[1] This Consolidated Reply addresses the Response filed by the Augustin Plains Ranch (APR) to the Community Protestants' Motion for Summary Judgment (the Community Protestants' Motion) and the Response filed by the Water Rights Division of the State Engineer's Office (the Water Rights Division) to the Community Protestants' Motion.

Issues presented

There are three central issues presented by the Motion for Summary Judgment filed by the Community Protestants. They are:

1) whether the Corrected Application filed with the State Engineer by the Augustin Plains Ranch (APR's Corrected Application) complies with the requirement of section 72-12-

[1] The Community Protestants are listed on page 45, *infra.*

3.A(2), NMSA 1978 that it demonstrate that APR has a specific beneficial use for the ground water that it proposes to appropriate from the San Augustin Basin;

2) whether that Application complies with the requirement of section 72-12-3.A(6), NMSA 1978 that it designate the particular location where the water to be appropriated would be used; and

3) whether the rulings of the State Engineer and the Seventh Judicial District Court (the District Court) dismissing the Application filed by APR in 2007 and 2008 (APR's Original Application) mandate that the State Engineer dismiss APR's Corrected Application.

Contrary to APR's assertions in its Response (APR's Response) to the Community Protestants' Motion for Summary Judgment (the Community Protestants' Motion), and contrary to the Water Rights Division's assertions in its Response to the Community Protestants' Motion (Water Rights Division's Response), New Mexico law requires that an application to appropriate ground water designate a specific beneficial use for the water to be appropriated and the particular location where the water will be used.

Also contrary to APR's assertions, and contrary to the Water Rights Division's assertions, APR's Corrected Application makes no such designations. Primarily for those two reasons, the Community Protestants' Motion demonstrated that the State Engineer must dismiss APR's Corrected Application. Finally, contrary to the assertions of APR and the Water Rights Division, the earlier rulings of the State Engineer and the District Court mandate that the State Engineer dismiss APR's Corrected Application.

Summary of the Community Protestants' arguments

The Community Protestants presented two alternative arguments in support of their Motion. First, the Community Protestants pointed out that the State Engineer is required to

dismiss APR's Corrected Application because of the failure of the Corrected Application to designate a specific beneficial use for the water to be appropriated and a particular place where the water to be appropriated would be used.[2]

Second, the Community Protestants' explained that the State Engineer is required by the earlier rulings of the State Engineer and the Seventh Judicial District Court (the District Court) addressing the application filed by APR in 2007 and 2008 (APR's Original Application) to dismiss APR's Corrected Application.[3]

Summary of the APR's responses

APR responded to the Community Protestants' argument that APR's Corrected Application should be dismissed because it fails to designate the specific purpose and particular place of use for the water to be appropriated. APR's first response was that this argument by the Community Protestants should be considered pursuant to the standard of review for a motion to dismiss under Rule 1-012(B)(6) of the Rules of Civil Procedure rather than under the standard of review for a summary judgment motion under Rule 1-056 of the Rules of Civil Procedure. APR's second assertion was that review of this argument by the Community Protestants under the standard for Rule 1-012(B)(6) indicated that the Motion should be denied.

APR also responded to the Community Protestants' argument that the rulings of the State Engineer and the District Court dismissing APR's Original Application require the State Engineer to dismiss APR's Corrected Application. APR asserted that this argument also should

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[2] Although the Community Protestants pointed out in their Memorandum supporting their Motion that APR's Corrected Application also lacks other required information, this Reply focuses on the Application's failure to designate a specific beneficial use for the water to be appropriated and its failure to specify a particular location where the water would be used.

[3] Section 19.25.2.1.A of the Office of the State Engineer Hearing Unit Procedures provides that the State Engineer Office procedures shall be generally consistent with the Rules of Civil Procedure. Rule 8.E(2) of those Rules authorizes the use of alternative statements of a claim.

be considered pursuant to the standard of review for a Rule 1-012.B(6) motion to dismiss, and that it should not be accepted by the State Engineer.

Finally, APR has endeavored to present additional allegations in response to the Community Protestants' arguments in APR's Reply to the Water Rights Division' Response to the NMELC Protestants' Motion for Summary Judgment (APR's Reply to the Water Rights Division), which was filed on November 28, 2017.

Summary of the Water Rights Division's Response

The Water Rights Division presented several assertions in its Response to the Community Protestants' Motion. The Water Rights Division asserted that the State Engineer "may" or "could" deny the Community Protestants' Motion. First, the Water Rights Division asserted that the Community Protestants Motion could be denied because it failed to comply with the requirements of Rule 1-056 of the Rules of Civil Procedure governing motions for summary judgment. Second, the Water Rights Division asserted that summary judgment is not appropriate because there are disputed facts. Third, the Water Rights Division alleged that the rulings of the State Engineer and the District Court dismissing APR's Original Application do not require the State Engineer to dismiss APR's Corrected Application.

ARGUMENT

I. The standard of review

A. APR's allegation that the Community Protestants' Motion cannot be reviewed as a motion for summary judgment is not persuasive.

In its Response, APR asserted that the Community Protestants' argument that APR's Corrected Application[4] should be dismissed (because of its failure to designate a specific

[4] The Application is referred to as "Corrected" because of changes that were made to it, not because any of the Community Protestants' issues were addressed.

beneficial use for the water to be appropriated, and the particular location where that use will occur) must not be reviewed as a motion for summary judgment in accordance with Rule 1-056 of the Rules of Civil Procedure. However, APR's allegations in support of this assertion are not persuasive.

1. The Community Protestants' Motion need not have been supported by affidavits.

APR has asserted unpersuasively that the Community Protestants' Motion should not be reviewed pursuant to the Rule 1-056 standard for a motion for summary judgment because the Community Protestants did not submit affidavits in support of the Motion. APR's Response, p. 11. This assertion ignores the language of Rule 1-056, which states:

> A. For claimant. A party seeking to recover upon a claim, counter-claim or cross-claim or to obtain a declaratory judgment may move with *or without* supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> B. For defending party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may move with *or without* supporting affidavits for a summary judgment as to all or any part thereof.
>
> C. Grounds for motion. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, *if any*, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 1-056, emphasis added.

Thus, the language of Rule 1-056 indicates that a motion for summary judgment need not be based on supporting affidavits. There is therefore no merit to APR's assertion that the Community Protestants' Motion should be denied because it was not supported by affidavits.

2. The Community Protestants' Motion was supported by exhibits.

APR also has asserted incorrectly that the Community Protestants' Motion was not supported by exhibits. *Id.* In fact, however, the language quoted above from Rule 1-056 does not indicate that a motion for summary judgment must be based on exhibits. Moreover, the first point of the Community Protestants' Motion was supported by references to exhibits. For example, the Memorandum Opinion of the District Court addressing APR's Original Application is referred to as exhibit #3 on page 20 of the Community Protestants' Memorandum in support of their Motion for Summary Judgment ("the Community Protestants' Memorandum") which was filed with the Community Protestants' Motion. As another example, the State Engineer's brief concerning APR's Original Application in the State Court of Appeals is referenced as exhibit #4 on pages 4 and 17 of the Community Protestants' Memorandum.

3. The Community Protestants set forth the facts supporting their Motion in their Memorandum filed with the Motion.

There is as well no merit to the allegation made by APR that the Community Protestants' Motion is not supported by facts (APR's Response, p. 11) or to the Water Rights Division's assertion that there are no undisputed facts. Water Rights Division's Response, pp. 3-6. The Community Protestants' Memorandum sets forth two sets of undisputed facts on which the Motion was based. In accordance with section 19.25.2.16 of the State Engineer Office Hearing Unit Procedures, which provides that the State Engineer Office procedures shall be "generally consistent" with the Rules of Civil Procedure, the Community Protestants set forth those facts in narrative rather than numbered form.[5]

[5] The Community Protestants' counsel regrets any inconvenience that this method of presenting facts caused the Hearing Officer and the other parties to this proceeding.

First, the Community Protestants' Memorandum provides the undisputed facts that are the basis for the Community Protestants' position that APR's Corrected Application does not provide information that is required for the State Engineer to approve a permit to appropriate water:

1. The undisputed facts demonstrating that APR's Corrected Application does not specify a beneficial use for the water to be appropriated are set forth on pages 7-9 of the Community Protestants' Memorandum.
2. Pages 9-10 of the Community Protestants' Memorandum provide the undisputed facts showing that APR's Corrected Application fails to designate the point of diversion of the water to be appropriated.
3. Pages 11-12 of the Community Protestants' Memorandum set forth the undisputed facts that show the failure of APR's Corrected Application to provide sufficient information to enable the State Engineer to evaluate APR's Corrected Application.
4. The Community Protestants' Memorandum sets forth at pages 13-14 undisputed facts demonstrating that APR's Corrected Application does not identify lands to be irrigated with the water to be appropriated
5. On page 16, the Community Protestants' Memorandum provides the undisputed facts indicating that APR's Corrected Application fails to set forth information necessary for the State Engineer to provide procedural due process to persons who may be affected by the proposed appropriation of water.

Second, the Community Protestants' Memorandum provides the undisputed facts indicating that the State Engineer is required to dismiss APR's Corrected Application because of

the earlier rulings of the State Engineer and the District Court dismissing the application filed by APR in 2007 and 2008 ("APR's Original Application"). Specifically:

6. On pages 24-26, the Community Protestants' Memorandum provides the undisputed facts that indicate the procedural history of APR's Original Application and APR's Corrected Application.
7. The undisputed facts demonstrating that APR's Corrected Application has not changed materially from APR's Original Application are set forth on pages 26-31 of the Community Protestants' Memorandum.
8. On page 31, the Community Protestants' Memorandum spells out the undisputed facts that indicate that the State Engineer's Office is conducting the proceeding concerning APR's Corrected Application as a continuation of the proceeding addressing APR's Original Application.
9. The Community Protestants' Memorandum provides on pages 33-34 the undisputed facts that demonstrate that if this proceeding is a continuation of the proceeding addressing APR's Original Application, the doctrine of the law of the case requires dismissal of APR's Corrected Application.
10. On pages 35-41, the Community Protestants' Memorandum sets forth the undisputed facts that indicate that the doctrine of *res judicata* requires dismissal of APR's Corrected Application if this proceeding is not a continuation of the earlier proceeding addressing APR's Original Application.
11. The Community Protestants' Memorandum provides on pages 42-45 the undisputed facts that demonstrate that the doctrine of collateral estoppel requires dismissal of

APR's Corrected Application if this proceeding is not a continuation of the earlier proceeding addressing APR's Original Application.

Thus, there is no merit to APR's assertions that the Community Protestants' Motion should be denied because it is not supported by affidavits or exhibits, or because the Community Protestants' Memorandum does not provide the undisputed facts on which the Motion is based.

B. The Water Rights Division's assertion that the Community Protestants' Motion should be denied for failure to present undisputed facts is not persuasive.

The Water Rights Division's Response asserts that the Community Protestants' Motion failed to list material facts as to which there is no genuine issue. However, as is indicated above, the Community Protestants did provide these facts in narrative form pursuant to the State Engineer's Office Hearing Unit Rules, which provide that the State Engineer's Office procedures shall be "generally consistent' with the Rules of Civil Procedure. Moreover, both the Corrected Application and the Water Rights Division's Response make clear that there are material facts that are not in dispute that demonstrate the failure of APR's Corrected Application to designate either a beneficial use for the water to be appropriated or a place where that water would be used.

1. The Corrected Application fails to designate a specific beneficial use for the water in issue or a particular place of use of that water.

APR's Corrected Application purports to address the use and place of use of the water to be appropriated in three ways. First, the Corrected Application indicates that the water to be appropriated would be used by "municipal, industrial and other users along the pipeline route". APR's Corrected Application, p. 3. The Corrected Application also states that the proposed "pipeline route" is more than 140 miles long. APR's Corrected Application, Attachment 2, Exhibit A, p. 1. Second, the Application asserts that the water will be used for municipal uses within the "authorized service areas" of the Albuquerque/Bernalillo County Water Utility

Authority, Belen, Los Lunas, Magdalena, Rio Rancho, and Socorro. Corrected Application, p. 3. Third, the Application states that water used for "bulk sales" will be used by "limited municipal and investor-owned utilities, commercial enterprises, and government entities in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties within the Rio Grande Basin." *Id.*

2. The Water Rights Division's Response confirms these undisputed facts.

The Water Rights Division's Response confirms that these facts are undisputed. It states that "[t]he corrected application recites only two purposes of use, namely: municipal and commercial water sales." Water Rights Division's Response, p. 5. The Water Rights Division's Response also states that the proposed place of use identified in APR's Corrected Application includes:

> The municipal water service areas of Magdalena, Socorro, Belen, Los Lunas, the Albuquerque Bernalillo County Water Utility Authority, and Rio Rancho; as well as commercial sales in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties within the Rio Grande Basin.

Id.

3. These three undisputed facts pertaining to APR's Corrected Application may be presented in numbered form.

The Community Protestants hereby list these undisputed facts in numbered form. They are:

Fact #1: APR's Corrected Application states that the water to be appropriated would be used by "municipal, industrial and other users along the [140+ mile] pipeline route".

Fact #2: APR's Corrected Application asserts that the water will be used for municipal uses within the "authorized service areas" of the Albuquerque/

Bernalillo County Water Utility Authority, Belen, Los Lunas, Magdalena, Rio Rancho, and Socorro.[6]

Fact #3: APR's Corrected Application states that water used for "bulk sales" will be used by "limited municipal and investor-owned utilities, commercial enterprises, and government entities in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties within the Rio Grande Basin."

Thus, there are undisputed facts, and the Water Rights Division's assertion that there are no undisputed facts (Water Rights Division's Response, pp. 3-6) is inaccurate. For these reasons, review of the Community Protestants' Motion pursuant to the standard of review for a 1-056 motion for summary judgment is appropriate.

C. Review of the Community Protestants' argument that the State Engineer must dismiss APR's Corrected Application pursuant to the standard for a motion to dismiss under Rule 1-012 of the Rules of Civil Procedure is also appropriate.

APR has asserted that the appropriate standard for review of the Community Protestants' argument that APR's Corrected Application should be dismissed is the standard for a motion to dismiss under Rule 1-012.B(6) of the Rules of Civil Procedure. APR's Response, pp. 11-12. That provision of Rule 1-012 provides that a party may move for dismissal of a complaint if the complaint fails "to state a claim upon which relief can be granted." Rule 1-012.B(6). As the Court of Appeals has noted:

> A motion to dismiss for failure state a claim under Rule 1-012(B)(6) NMRA 2001 tests the legal sufficiency of the complaint, not the facts that support it. Under Rule 1-012(B)(6), dismissal is proper when the law does not support the claim under any set of facts subject to proof.

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[6] Two of these municipalities – Magdalena and Socorro – protested APR's Corrected Application.

Wallis v. Smith, 2001-NMCA-017, ¶6, 130 N.M. 214, 216.

The Community Protestants' argument that APR's Corrected Application should be dismissed may be reviewed pursuant to this standard because the argument addresses the facial deficiencies in APR's Corrected Application. Review of the Community Protestants' position under either standard – the Rule 1-012.B(6) motion to dismiss standard or the Rule 1-056 motion for summary judgment standard – indicates that the Corrected Application must be dismissed.[7]

III. APR's Corrected Application fails to comply with the requirements of New Mexico law.

A. An application to appropriate ground water must designate a specific beneficial use for ground water to be appropriated and the particular place where the water would be used.

In New Mexico, beneficial use of water is "the basis, the measure and the limit of the right to use water." N.M. Constitution, Article XVI, §3, NMSA 1978, §72-1-2. Accordingly, an applicant for a permit to appropriate ground water must designate the beneficial use to which the water will be put. NMSA 1978, §72-12-3.A. The New Mexico courts that have interpreted this requirement have determined that a party that would appropriate water can only obtain a right to as much water as the party will apply to beneficial use. *See* State *ex rel.* Martinez v. City of Las Vegas, 2004-NMSC-009, ¶34, 135 N.M. 375, 386, Carangelo v. Albuquerque-Bernalillo County Water Utility Authority, 2014-NMCA-032, ¶35, 320 P.3d 492, 503. As the District Court pointed out in its Memorandum Decision on Motion for Summary Judgment (District Court Memorandum) upholding the State Engineer's dismissal of APR's Original Application, this means that an applicant for a water right must indicate the specific use to which the water will be put and the particular place where that use will occur. The District Court stated:

[7] Notably, APR's Original Application was dismissed by the State Engineer pursuant to a motion to dismiss filed by the Community Protestants.

> New Mexico courts have long considered specificity to be a statutory requirement for an underground water permit. *Hanson v. Turney, supra* ("A water permit is ... 'the necessary first step' in obtaining a water right... to one day apply the state's water in a **particular place** and to a **specific beneficial use.")** (citations omitted); *Mathers v. Texaco, Inc.*, 77 N.M. 239, 248, 421 P.2d 771 (S. Ct. 1977) ("Here the applicant, Texaco, has **expressly specified the particular use** for which the water **is** to be appropriated and the **precise lands** to which the same **is** to be applied to accomplish the purpose of such use.") (emphasis added); *Cartwright v. Public Serv. Co.*, 66 N.M. 64, 110, 343 P.2d 654 (1959) (Frederici, D.J., dissenting) ("The appropriator acquires only the right to take from the stream a given quantity of water for **a specified purpose**, Snow v. Abalos, 18 N.M. 681, 140 P. 1044, supra. Many times this Court has held that the priority of right is based upon the intent to take **a specified amount** of water for **a specified purpose** and he can only acquire a perfected right to so much water as he applied to beneficial use.") (emphasis added)

District Court Memorandum, pp. 19-20, emphasis in original.

B. APR's Corrected Application fails to designate a specific beneficial use for the ground water to be appropriated.

APR's Corrected Application clearly fails to provide the specific information addressing the beneficial use for the water to be appropriated that is required by New Mexico courts for applications to appropriate ground water. First, the Corrected Application indicates that the water to be appropriated would be used by "municipal, industrial and other users along the [proposed 140+ miles] pipeline route". Corrected Application, p. 3, Corrected Application, Attachment 2, Exhibit A, p.1. Second, the Application asserts that the water will be used for municipal uses within the "authorized service areas" of the Albuquerque/Bernalillo County Water Utility Authority, Belen, Los Lunas, Magdalena, Rio Rancho, and Socorro. Corrected Application, p. 3. Third, the Application states that water used for "bulk sales" will be used by "limited municipal and investor-owned utilities, commercial enterprises, and government entities in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties." *Id.*

None of this provides specific information about the purpose for which the water to be appropriated would be used. The Corrected Application's assertion that water would be used by

users "along the pipeline route" indicates only that there could possibly be users along that 140+ mile route. The reference to "limited municipal and investor-owned utilities, commercial enterprises and government entities" in parts of seven named counties provides no information about the use to which the water would be put, and the Corrected Application includes no executed sale, service, or lease agreements for use of the water.

Similarly, the Corrected Application's references to "bulk sales" indicates only that APR intends to sell rights to use the water at issue, but those references provide no information about who the buyers of those rights would be or what they would do with the water. In addition, APR's assertion that bulk sales such as its proposed commercial sales have been recognized as beneficial uses (APR's Response, p. 8) is not supported by the decisions in Trujillo v. CS Cattle Co., 1900-NMSC-037, 109 N.M. 705 and Albuquerque Land & Irrigation Co. v. Gutierrez, 1900-NMSC-017, 10 N.M. 177 since both of those cases involved transfers of existing water rights and not applications for new appropriations. Finally, the Corrected Application's assertion that the water to be appropriated would be used in the municipal areas of Magdalena and Socorro is belied by the protests against the Corrected Application filed by those two municipal entities.[8]

C. APR's Corrected Application fails to designate the particular location at which the water to be appropriated would be used.

New Mexico law requires that an application to appropriate ground water specify where the water will be put to use. *See* p. 7, *supra*, and NMSA 1978 section 72-12-3.A(6). This requirement was also noted by the Supreme Court in Mathers. v. Texaco, Inc., *supra*, where the Court pointed out that:

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[8] The Village of Magdalena's protest was dismissed for failure to pay the $25 protest fee. *See* State Engineer Hearing Officer's Scheduling Order, Attachment A, p.4.

> [t]he applicant, Texaco, has expressly specified the particular use for which the water is to be appropriated and the precise lands to which the same is to be applied to accomplish the purpose of such use.

1966-NMSC-226, ¶27, 77 N.M. 248.

APR's Corrected Application, however, provides no indication of any "precise lands" where the water to be appropriated would be used. It indicates that the water to be appropriated would be used in any one or more of the following seven counties: Bernalillo, Catron, Sandoval, Santa Fe, Sierra, Socorro, and Valencia. APR Response, p. 21. Even APR concedes that this identifies only "general places of use." *Id.* This is not a description of the "precise lands" where the water to be appropriated by APR would be used; on the contrary, it describes an area that includes approximately 12 million acres of land.

Attachment 2 to APR's Corrected Application also lists six municipal areas – the areas served by the Albuquerque/Bernalillo County Water Utility Authority, Belen, Los Lunas, Magdalena, Rio Rancho, and Socorro – as places where the water might be used. APR's Corrected Application, Attachment 2. The Corrected Application indicates as well that APR proposes to provide water to users for unnamed uses along a pipeline more than 140 miles in length (APR Corrected Application, Attachment 2, Exhibit A, p. 1) that would stretch from Datil to Socorro and from Socorro to Albuquerque. Both of these descriptions provide only possible locations where the water to be appropriated could be used. Neither of these descriptions provides particular locations where the water to be appropriated would be used. Moreover, as noted earlier, both Magdalena and Socorro have protested APR's Corrected Application.

IV. APR's Corrected Application must be dismissed pursuant to the standard of review for either a Rule 1-012 motion to dismiss or a Rule 1-056 motion for summary judgment.

A. Review of APR's Corrected Application pursuant to Rule 1-012.B(6) indicates that the Corrected Application must be dismissed.

As was pointed out above (pp. 11-12), Rule 1-012.B(6) provides for a motion to dismiss if the complaint "fails to state a claim upon which relief can be granted," and a motion to dismiss filed under Rule 1-012.B(6) "tests the legal sufficiency" of the complaint. *See* Wallis v. Smith, 2001-NMCA-017, ¶6, 130 N.M. 214, 216.

As the Community Protestants have explained, APR's Corrected Application violates section 72-12-3.A(2) NMSA 1978 because it fails to designate a specific beneficial use for the water that APR seeks to appropriate. As they also have explained, APR's Corrected Application also violates section 72-12-3.A(6) because it fails to designate the particular location at which the water would be used. Because the Corrected Application fails to present these required elements for an appropriation of ground water, it is legally insufficient. As the District Court pointed out in the language of its Memorandum quoted on pages 12-13 above, "New Mexico courts have long considered specificity to be a statutory requirement for an underground water permit." District Court Memorandum, p. 19. As the District Court also noted:

> Applicants' [APR's] plan for the use of 54,000 afy reveals no definiteness or certainty other than the purpose of the application being the creation of a pipeline served by 37 wells, with the actual uses to be figured out later. Under this plan, diversion would supplant beneficial use as the fundamental principle of water use in New Mexico. One would only have to apply for a permit to divert a given quantity of water, no matter how large, and that person would then have a prior claim to the water over anyone else who actually had a specific plan for the water's use.

District Court Memorandum, p. 27.

These principles make clear that APR's Corrected Application is defective on its face because of its failure to designate a specific beneficial use for the water that it proposes to

appropriate and its failure to designate a particular place where that water would be used. APR's Corrected Application therefore must be dismissed pursuant to the standard of review for a Rule 1-012.B(6) motion to dismiss.

B. APR's Corrected Application must be dismissed pursuant to the standard for review of a Rule 1-056 motion for summary judgment.

Summary judgment is appropriate in situations in which the claim at issue is based on a document, such as a contract, that is unambiguous. *See* Community Protestants' Memorandum, p. 3, Bauer v. College of Santa Fe, 2003-NMCA-121¶¶11-12, 134 N.M. 439, 442. In this matter, APR's Corrected Application is unambiguous. There can be no dispute as to the statements made in the Corrected Application, and neither APR nor the Water Rights Division has asserted that there is any such dispute as to the content of the Corrected Application. As is explained above (pp. 13-14, *supra*), the Application unambiguously fails to designate a specific beneficial use for the water that APR seeks to appropriate and to designate a particular location where that water would be used is equally unambiguous (pp. 14-15, *supra*).

Because APR's Corrected Application fails to designate a specific beneficial use for the water to be appropriated, the Corrected Application is insufficient as a matter of law. The Community Protestants therefore are entitled to summary judgment dismissing the Corrected Application as a matter of law. *See* NMSA 1978 §72-12-3.A(2), State *ex rel.* Martinez v. City of Las Vegas, 2004-NMSC-009, ¶34, 135 N.M. 375, 386, Carangelo v. Albuquerque-Bernalillo County Water Utility Authority, 2014-NMCA-032, ¶35, 320 P.3d 492, 503, NMSA 1978, District Court Memorandum, pp. 19-20. The Community Protestants also are entitled to summary judgment dismissing APR's Corrected Application as a matter of law because of its failure to designate the particular location where the water to be appropriated would be used. *See* NMSA 1978 §72-12-3.A(6), District Court Memorandum, pp. 19-20.

V. The efforts of APR and the Water Rights Division to avoid dismissal of APR's Corrected Application are not persuasive.

A. APR's assertions that the Corrected Application is sufficient are not persuasive.

1. The acceptance of APR's Corrected Application for filing does not preclude dismissal of the Corrected Application.

In its Response, APR has asserted unpersuasively that the acceptance of the Corrected Application by the State Engineer's Office staff means that the Application cannot be dismissed pursuant to the Community Protestants' Motion. APR's Response, p. 23. This is equivalent to asserting that a Judge cannot dismiss a complaint after it has been accepted for filing by the court clerk, a notion that conflicts with common sense and with the Rules of Civil Procedure.

Specifically, Rule 1-012B(6) of the Rules of Civil Procedure, which APR concedes applies to the Community Protestants' Motion (APR's Response, pp. 11-13), provides for dismissal of complaints that have been filed but that are determined to be without merit solely on the basis of the pleadings. Just as a Judge can dismiss a complaint that has been accepted for filing by the court clerk but that the Judge determines to be without merit based solely on its allegations, the State Engineer can dismiss APR's Corrected Application based on its failure to specify the specific beneficial use of the water to be appropriated and the particular location where the water would be used.

The statutory basis for the authority of the State Engineer to reject an application that has been accepted administratively by the State Engineer's Office staff for purposes of providing notice was explained by the District Court when APR raised this argument concerning its Original Application. The District Court pointed out that section 72-12-3.F, NMSA 1978 specifically provides for dismissal of an application without a hearing, and that this provision would be negated if acceptance for filing required that an evidentiary hearing be conducted.

District Court Memorandum, pp. 11-12. Because statutes are to be read to give meaning to all of their provisions, the District Court concluded that acceptance of APR's Original Application did not mean that the State Engineer could not dismiss it pursuant to a motion to dismiss filed in accordance with Rule 1-012.B(6). The same reasoning applies to the dismissal of APR's Corrected Application pursuant to the Community Protestants' Motion.

2. The court rulings following dismissal of APR's Original Application do not preclude dismissal of APR's Corrected Application.

APR's Response also endeavors unsuccessfully to argue that the rulings of the Court of Appeals, the Supreme Court, and the District Court following dismissal of APR's Original Application mean that its Corrected Application cannot be dismissed. This argument is unpersuasive for two reasons.

First, APR asserts that the Court of Appeals' dismissal of the appeal addressing the Original Application, the Supreme Court's refusal to consider that dismissal, and the District Court's denial of the Community Protestants' motion to re-open that Court's proceeding mean that the State Engineer cannot dismiss APR's Corrected Application. APR's Response, pp. 48-50. APR's interpretation of those Courts' rulings is without basis. None of those Courts indicated anything in its order about the merits of APR's Corrected Application.

Second, APR has alleged that the dismissal of its Original Application without prejudice means that its Corrected Application cannot be dismissed. APR's Response, pp. 47-48. However, the dismissal of APR's Original Application without prejudice cannot be interpreted to mean that APR's Corrected Application must be considered regardless of its lack of merit. As the District Court noted in its Memorandum:

> The dismissal without prejudice allows Applicant [APR] to submit an application that meets the statutory requirements of specificity for beneficial use and place of use.

District Court Memorandum, p. 21.

APR has failed to submit such an application. APR's Corrected Application fails to provide both a specific beneficial use for the water that APR seeks to appropriate and a particular location where that use would occur.

3. APR's reliance on the Supreme Court's ruling in Mathers v. Texaco, Inc. is misplaced.

There also is no merit to APR's allegation that the Community Protestants' position is similar to the argument that was rejected by the Supreme Court in Mathers v. Texaco, Inc., 1966-NMSC-226, 77 N.M. 239. APR Response, p. 19. In Mathers, the Court determined that nothing in New Mexico law requires that an application to appropriate ground water set forth the names of the people who may ultimately use or benefit from the water to be appropriated.

In this case, however, the Community Protestants have never argued that the APR Corrected Application must set forth the names of the people who would use the water to be appropriated or that the Corrected Application is deficient because it did not set forth those names. *See* Community Protestants' Memorandum, pp. 1-24, 45. Moreover, a comparison of the facts in the Mathers case to APR's Corrected Application indicates the extent to which the Corrected Application fails to designate the beneficial use for the water to be appropriated.

In Mathers, Texaco, Inc. applied for a permit to appropriate "350-acre feet [of water] per year for the purpose of water flooding 1,360 acres of oil-bearing formation in a producing oil field." 1966-NMSC-226, ¶1, 77 N.M. 241. By contrast, APR's Corrected Application proposes to provide water to users for unnamed uses along a pipeline approximately 140+ miles in length (APR Corrected Application, Attachment 2, Exhibit A, p. 1) that would stretch from Datil to Socorro and from Socorro to Albuquerque. The Corrected Application indicates only that the

water to be appropriated would be used for municipal purposes in one or more of six different municipal areas (two of which have protested APR's Corrected Application) and for bulk sales to unknown parties for unknown purposes. There is nothing in APR's Corrected Application that is comparable to the descriptions in the Mathers case of the specific beneficial use of water sought to be appropriated by Texaco, Inc. or the particular location where that use would occur.

B. The Water Rights Division's assertions that APR's Corrected Application is sufficient are without merit.

1. The Water Rights Division's unsupported assertion that APR's Corrected Application is complete is not persuasive.

The Water Rights Division's first unpersuasive assertion is that "[t]he application is complete in accordance with current statutory and regulatory requirements." Water Rights Division Response, p. 2. Despite the importance of this assertion to the issues presented by APR's Corrected Application, the Water Rights Division provides neither an explanation nor an argument to support it. The assertion is simply presented as a legal conclusion without any factual or legal basis. Moreover, this assertion is contradicted directly by the plain language of section 72-12-3, NMSA 1978, which states:

> A. Any person, firm or corporation or any other entity desiring to appropriate for beneficial use any of the waters ... shall apply to the state engineer in a form prescribed by him. *In the application, the applicant shall designate*:
> (2) the beneficial use to which the water will be applied;
> ...
> (6) the place of the use for which the water is desired;
> ....

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

There is therefore no merit to the Water Rights Division's unsupported assertion that APR's Corrected Application is complete.

2. The Water Rights Division's reliance on the dismissal of APR's Original Application without prejudice is misplaced.

The Water Rights Division's second allegation to the effect that APR's Corrected Application should not be dismissed is equally without merit. This allegation purports to rest on the language in the State Engineer's March 30, 2012 Order dismissing APR's Original Application[9] "without prejudice to filing of subsequent applications." Water Rights Division Response, p. 5. The Water Rights Division appears to interpret this language to mean that APR's Corrected Application cannot be dismissed, but this interpretation is belied both by the State Engineer's own brief in the Court of Appeals[10] and by the language of the District Court addressing the dismissal of APR's Original Application. As the Water Rights Division acknowledged, the State Engineer's own brief stated that APR could file a "new application to the State Engineer that comports with law." *Id.* Similarly, as was noted above, the District Court pointed out in its Memorandum that the dismissal without prejudice permitted APR to submit a new application that "meets the statutory requirements of specificity for beneficial use and place of use." District Court Memorandum, p. 21.

It therefore is clear that APR's Corrected Application can be dismissed for its failure to comply with applicable statutory requirements, and in fact the Application has failed to comply with the requirements that it designate a specific beneficial use and a particular place of use for the water to be appropriated.

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[9] This Order was attached as Exhibit 1 to the Community Protestants' Memorandum.

[10] The brief was filed in the appeal APR filed from the District Court ruling upholding the State Engineer's decision dismissing APR's Original Application.

3. There is no merit to the Water Rights Division's assertion that the Community Protestants have equated acceptance of APR's Corrected Application with approval of the Corrected Application.

The Water Rights Division's third allegation is also unpersuasive. The Water Rights Division has asserted that the Community Protestants have "equated" the Division's acceptance of APR's Corrected Application with the State Engineer's approval of that Application. Water Rights Division Response, p. 6. However, like the Water Rights Division's first allegation, this assertion is unsupported by any facts, and the pages of the Community Protestants' Memorandum (pp. 18-24) cited by the Water Rights Division in support of this assertion never make such an equation. On the contrary, those pages present an argument that APR's open-ended Corrected Application is not consistent with New Mexico law requiring that an application to appropriate water designate the specific purpose and place of use of the water.

The Community Protestants' argument is based on section 72-12-3.A NMSA 1978, which is quoted above. It clearly and unambiguously requires that an application to appropriate ground water designate the specific beneficial use for the water to be appropriated and the particular place where that use will occur. The Water Rights Division's allegation that the Community Protestants are "equating" the standards for APR's Corrected Application with the standards for approval of the Corrected Application is simply an effort to avoid acknowledging the mandatory language of the statute, and it is not persuasive.

4. There is no merit to the Water Rights Division's assertions that the Community Protestants' Motion cannot succeed as a motion for summary judgment.

The Water Rights Division has asserted that the Community Protestants' Motion should be denied because it failed to present undisputed facts on which it is based, and that it therefore

does not comply with the requirements applicable to motions for summary judgment. This assertion is unpersuasive for two reasons.

First, as was pointed out above, the State Engineer's Office Hearing Unit Rules provide only that the State Engineer's Office procedures shall be "generally consistent" with the Rules of Civil Procedure. Section 19.25.2.16, NMAC. There is therefore no requirement that the State Engineer's Office Hearing Unit procedures be exactly the same as the procedures outlined by the Rules of Civil Procedure. Second, as is explained on pages 9-11 above, the Community Protestants' Motion is based on undisputed facts that are demonstrated by APR's Corrected Application and confirmed by the Water Rights Division's Response.

II. The rulings of the State Engineer and the District Court dismissing the Original APR Application require the State Engineer to dismiss the Corrected APR Application.

A. The State Engineer should treat this point of the Community Protestants' Motion to dismiss as a motion for summary judgment.

As the Community Protestants pointed out in their Memorandum, Rule 1-056 of the Rules of Civil Procedure applies to this proceeding. That Rule provides that a party may obtain summary judgment if there is no dispute as to any material fact and the party is entitled to judgment as a matter of law. Rule 1-056.C. *See also* Tafoya v. Rael, 2008-NMSC-057, ¶11, 145 N.M. 4, 6-7. Rule 1-056 also indicates that materials in addition to the pleadings may be considered in determining whether summary judgment should be granted. *See* Rule 1-056.C.

The Community Protestants' Motion's argument that the rulings of the State Engineer and the District Court dismissing APR's Original Application also require dismissal of APR's Corrected Application is based on the undisputed facts shown by APR's Corrected Application and several exhibits, and on the applicable law. It would not be appropriate for the State Engineer to consider this argument pursuant to the standard for review of a motion to dismiss

under Rule 1-012.B(6) because that standard applies to review of a complaint, or in this case APR's Corrected Application, alone. This argument by the Community Protestants therefore should be evaluated as a Rule 1-056 motion for summary judgment.

B. There are material facts concerning APR's Corrected Application and APR's Original Application as to which there is no genuine issue.

For purposes of Rule 1-056, a fact is material if it "will affect the outcome of the case." Parker v. E.I. Du Pont de Nemours & Company, 1995-NMCA-086, ¶9, 121 N.M. 120, 124. In this matter, there are material facts as to which there is no dispute.

The first three material facts are listed on pages 10-11 above. They demonstrate that APR's Corrected Application does not designate either a specific beneficial use for the water that APR seeks to appropriate or a particular place where that use would occur. The following four undisputed material facts relate to APR's Original Application, and they demonstrate that it too failed to designate a specific beneficial use for the water to be appropriated and a particular place where beneficial use would occur. These four facts are:

Fact #4: APR's Original Application checked every type of possible beneficial use of water (domestic, livestock, irrigation, municipal, industrial, and commercial) identified on the application form. APR's Original Application, p. 1.

Fact #5: APR's Original Application also named the following uses: environmental, recreational, subdivision, and related, replacement, and augmentation. *Id.*

Fact #6: APR's Original Application added as well the following statement as to potential uses of water: The purpose of this amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B in order to reduce the

current stress on the water supply of the Rio Grande Basin in New Mexico. *Id.*, p.2.

Fact #7: APR's Original Application Attachment B identified the places of use as anywhere within the exterior boundaries of APR's ranch, which is located in Catron County, New Mexico, and "any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico." APR's Original Application, Attachment B, pp. 1-2.

None of these descriptions names a specific beneficial use for the water that APR sought to appropriate or a particular place of use for that water. Thus, in that respect, APR's Original Application is identical to APR's Corrected Application; each Application fails to designate the specific beneficial use for the water to be appropriated and the particular place where beneficial use would occur.

Moreover, the failures of both Applications to specify the purpose and place of use of the water to be appropriated are material facts for purposes of a Rule 1-056 motion for summary judgment because they are facts that affect the outcome of the proceeding. *See* Parker v. E.I. Du Pont de Nemours & Company, 1995-NMCA-086, ¶9, 121 N.M. 120, 124.

C. APR's efforts to distinguish its Corrected Application from its Original Application are not persuasive.

1. Neither APR's Original Application nor APR's Corrected Application designates a specific beneficial use for the water to be appropriated.

Contrary to APR's allegations (APR's Response, pp. 43-45), there is no designation of the specific beneficial use for the water to be appropriated provided in either APR's Corrected Application or APR's Original Application. As the Community Protestants explained in their

Memorandum, APR's Original Application failed to designate the specific beneficial use to which the water to be appropriated would be put. Community Protestants' Memorandum, p. 30. APR has alleged that its Corrected Application is different from its Original Application for several reasons, including some that could be read to pertain to the use of the water to be appropriated. Specifically, APR has asserted that its Corrected Application is different from APR's Original Application because the Corrected Application:

1. includes a detailed plan and project description, identifies the supply of water, the demand, the property, "projected users," and project benefits (APR Response, p. 43);
2. includes a detailed pipeline route, and specifies that use will occur along that route (*Id.* p. 44);
3. includes "two letters of support from a municipal end user" (*Id.*);
4. includes "additional information about parts of counties" where use will occur (*Id.*);
5. does not include "the Ranch as a place of use" (*Id.*);
6. "does not include a request to use the water for domestic, livestock, irrigation, industrial, or commercial purposes" (*Id.*);
7. includes a request to use the water for "commercial sales" and includes "significant information" about where that use will occur (*Id.*);
8. "does not include compliance with the Rio Grande Compact as a purpose of use" *Id.*;
9. includes "information about the hydrologic investigation and studies" that have been completed (*Id.*);
10. includes information about the "engineering investigation and studies" that have been completed (*Id.*);
11. includes information about "stakeholder involvement" that has taken place (*Id.*);

12. includes information about "the financial viability and feasibility of the project" (*Id.*);

13. includes a request for approval of "an enhanced recharge project" (*Id.*);

14. includes a description of business arrangements for the project and sample documents (*Id.* p. 45);

15. includes a " conceptual design and description of the distribution system, delivery points, and methods of delivery to end users" (*Id.*); and

16. includes a request for a two stage hearing process. (*Id.*)

None of this information in APR's Corrected Application designates a specific beneficial use for the water to be appropriated. The "projected users" referred to in item #1 are in fact only possible users of the water; none of them has made a commitment to use the water for a definite purpose. The reference in item #2 to users along the pipeline route does not demonstrate a commitment by any such user and fails to designate any beneficial use along that route. The "letters of support" from the City of Rio Rancho referred to in item #3 do not indicate that Rio Rancho has made a commitment to use the water. The letter from Rio Rancho Mayor Gregory Hull states only that Rio Rancho "would consider engaging" APR as a customer for water. APR Corrected Application, Attachment 2, Exhibit E. Similarly, the letter from Rio Rancho City Manager Keith Riesberg states that Rio Rancho "is interested in discussing" with APR the use of water for Rio Rancho's municipal and other uses. *Id.* The request to use the water "for commercial sales" referred to in item #7 provides no information about the specific sales or specific beneficial uses for the water that is sold through such sales. Finally, the "conceptual design and description of the distribution system, delivery points, and methods of delivery to end users" referred to in item #15 provides no designation of any specific beneficial use for the water to be appropriated.

Thus, there can be no genuine dispute as to the fact that APR's Corrected Application and APR's Original Application each fails to designate a specific beneficial use for the water that APR seeks to appropriate. Moreover, it is clear that each Application was required to designate a specific beneficial use, and that the failure to do so is a material fact because the failure to do so is a basis for denial of an application to appropriate ground water. *See* NMSA 1978 §72-1-2; NMSA 1978, §72-12-3.A; State *ex rel.* Martinez v. City of Las Vegas, 2004-NMSC-009, ¶34, 135 N.M. 375, 386, Carangelo v. Albuquerque-Bernalillo County Water Utility Authority, 20124-NMCA-032, ¶35, 320 P.3d 492, 503; District Court Memorandum, pp. 19-20; Parker v. E.I. Du Pont de Nemours & Company, 1995-NMCA-086, ¶9, 121 N.M. 120, 124.

2. Like APR's Original Application, APR's Corrected Application fails to designate the particular place where the water would be used.

The second material fact about which there is no genuine issue is that both APR's Corrected Application and APR's Original Application fail to designate the particular place of use for the water at issue. The Community Protestants pointed out in their Memorandum that APR's Original Application failed to designate the location at which the water to be appropriated would be put to beneficial use, indicating only that use of the water would occur within the boundaries of APR's ranch and within the Rio Grande Basin in seven New Mexico counties. Community Protestants' Memorandum, p. 30. APR's Corrected Application provides a similarly vague description of the locations where the water to be appropriated would be used.

APR's Corrected Application indicates that the water to be appropriated would be used in any one or more of the same seven counties: Bernalillo, Catron, Sandoval, Santa Fe, Sierra, Socorro, and Valencia, which APR characterizes as identifying "general places" of use. APR Response, p. 21. APR's Corrected Application also lists six municipal areas – Magdalena, Socorro, Belen, Los Lunas, Rio Rancho, and the area served by the Albuquerque/Bernalillo

County Water Utility Authority – as places where the water would be used.[11] APR's Corrected Application, Attachment 2. The Corrected Application indicates as well that APR proposes to provide water to unidentified users for unnamed uses along the 140+ mile route to be followed by APR's proposed pipeline. APR Corrected Application, Attachment 2, Exhibit A, p. 1. None of these descriptions actually designates one or more particular locations where the water at issue would be used; they indicate only possible locations for possible use.

The failure of APR's Corrected Application and APR's Original Application to designate a particular place of use for the water to be appropriated is a material fact. Designation of the particular location where the water to be appropriated would be used is required by statute, and the failure to designate the particular place of use for the water at issue is a basis for denial of an application for a permit to appropriate ground water. *See* NMSA 1978 §72-12-3.A(6), District Court Memorandum, pp. 15-20.

D. The Water Rights Division's assertion that there are material differences between APR's Corrected Application and its Original Application i9s not persuasive.

The Water Rights Division asserts that APR's Corrected Application provides "greater specificity" than APR's Original Application, and that there are "differences" between the two Applications. Water Rights Division's Response, p. 4. However, the examples cited by the Water Rights Division's Response prove the Community Protestants' point that the two Applications are identical in their failure to specify either a purpose or place of use of the water to be appropriated.

The Water Rights Division's first example purports to address the beneficial use for the water that APR seeks to appropriate, but the provisions of APR's Corrected Application to which the Water Rights Division refers indicate only that the water would be used for "municipal and

[11] As has been noted, both Magdalena and Socorro protested the Corrected Application.

commercial water sales." Water Rights Division's Response, p. 5. Nothing in the provision of APR's Corrected Application referenced by the Water Rights Division indicates what entity will use the water for municipal purposes, who the purchasers of the "commercial water sales" will be, or the uses to which those purchasers will put the water.

The Water Rights Division also refers to the description of possible locations of use of the water in the Corrected Application as being "much more specific." *Id.* In fact, however, the Corrected Application's description is not specific. It states that use could occur in the service area of one or more of six municipal areas[12] or in parts of seven named counties within the Rio Grande Basin. *Id.* The total area covered by those seven counties includes approximately 12 million acres. There is no indication in APR's Corrected Application that use of the water to be appropriated would occur at any specific location in any of those municipal areas or in any of those counties.

For these reasons, the Water Rights Division's effort to distinguish APR's Corrected Application from APR's Original Application fails. The two Applications are identical in that neither of them designates a specific beneficial use for the water to be appropriated or a particular place where that beneficial use would occur. For that reason, the earlier rulings of the State Engineer and the District Court dismissing APR's Original Application require the State Engineer to dismiss APR's Corrected Application pursuant to one of the alternative doctrines of the law of the case, *res judicata*, and collateral estoppel. *See* Community Protestants' Memorandum, pp. 24-45.

[12] As noted earlier, two of these municipalities – Magdalena and Socorro – protested APR's Corrected Application.

E. The State Engineer and the District Court both ruled that APR's Original Application was inadequate because of its failure to designate the purpose and the place of use for the water to be appropriated.

The State Engineer dismissed the Original APR Application because it did not provide information required for the State Engineer to evaluate an application to appropriate water, including the specific beneficial use to which the water sought by APR would be put and the particular location where the water would be used. *See* March 30, 2012 ruling by the State Engineer denying APR's Original Application (State Engineer's Denial Order) (Exhibit 1 to the Community Protestants' Memorandum), pp. 2-5, ¶¶5-11, 18-26. The District Court affirmed the dismissal of the Original APR Application on several grounds, including the failure of the Original Application to designate the specific beneficial use to which the water would be put and the particular location at which that use would occur. District Court Memorandum, pp. 15-32.

F. The earlier rulings of the State Engineer and the District Court require the State Engineer to dismiss APR's Corrected Application.

1. The District Court's ruling dismissing APR's Original Application is the law of the case and is binding on the State Engineer in this proceeding.

As the Community Protestants explained in their Memorandum, a ruling on appeal in a proceeding becomes the law of the case in subsequent proceedings in the lower tribunal. *See* Community Protestants' Memorandum, pp. 31-34, Badilla v., Wal-Mart Stores East, Inc., 2017-NMCA-021, ¶5, 389 P.3d 1050, 1053. The State Engineer Office is conducting this proceeding as a continuation of the proceeding addressing APR's Original Application by continuing the same file number and determining that protests filed in response to APR's Original Application apply as well to APR's Corrected Application. *See* Community Protestants' Memorandum, pp. 32-34. For that reason, the District Court ruling dismissing APR's Original Application because of its failure to designate a beneficial use for the water to be appropriated and a place where that

beneficial use would occur is the law of the case in this matter. That ruling therefore requires that the State Engineer dismiss APR's Corrected Application for the same reasons.

APR has alleged that the rulings of the District Court denying APR's motion to dismiss and remand to the State Engineer and denying the Community Protestants' motion to re-open the case indicate that the current proceeding is not a continuation of the proceeding addressing APR's Original Application, but that allegation is not persuasive. The District Court's orders did state that the case was "closed", but the case to which the orders referred was the case in the District Court, not the proceeding before the State Engineer. Therefore, neither of those District Court orders precludes the State Engineer from treating this proceeding as a continuation of the earlier proceeding addressing APR's Original Application, and the State Engineer is doing that.

2. The doctrines of *res judicata* and collateral estoppel require the State Engineer to dismiss APR's Corrected Application.

Moreover, even assuming *arguendo* that this proceeding is not a continuation of the earlier proceeding addressing APR's Original Application, the doctrines of *res judicata* and collateral estoppel require that the State Engineer dismiss APR's Corrected Application.

a. The State Engineer is required by the doctrine of *res judicata* to dismiss APR's Corrected Application.

As the Community Protestants explained in their Memorandum, the doctrine of *res judicata* is intended to give a litigant "only one full and fair opportunity to litigate a claim." *See* Tafoya v. Morrison, 2017-NMCA-025, ¶32, 389 P.3d 1098, 1107. As the Community Protestants also explained, the doctrine of *res judicata* applies when a proceeding addresses the same issues that were addressed in an earlier proceeding and six conditions are met.[13] Finally,

[13] The parties in the cases must be the same or in privity; the subject matter of the cases must be the same; the capacity of the party against whom the doctrine is invoked must be the same; the same cause of action must be involved in both cases; there must have been a final (continued)

the Community Protestants explained that all of those conditions are met in this situation, and that the doctrine of *res judicata* therefore is applicable.

APR has alleged that the doctrine of *res judicata* is not applicable because APR's Corrected Application is not "materially identical" to APR's Original Application. APR's Response, p. 45. That allegation is not persuasive.

The *res judicata* issue is whether the dismissal of APR's Original Application in the earlier proceeding addressing that Application precludes APR from litigating the validity of its Corrected Application in this proceeding. In other words, the issue is whether litigation of the validity of APR's Corrected Application constitutes a repeat of the litigation of the validity of the proceeding addressing APR's Original Application. An examination of APR's Corrected Application indicates that litigating its validity does in fact constitute a repeat of that litigation and that it therefore is precluded by the doctrine of *res judicata*.

Two of the reasons that the State Engineer dismissed APR's Original Application and that the District Court upheld that dismissal were that the Original Application failed to designate a specific beneficial use of the water to be appropriated and failed to specify the particular location where that use would occur. *See* State Engineer's Denial Order, pp. 2-5, ¶¶5-11, 18-26, District Court Memorandum, pp. 15-32. As the Community Protestants have explained, APR's Corrected Application also fails to designate both a specific beneficial use for the water to be appropriated and a particular location where such a beneficial use would occur. Nothing in APR's list of differences between its Original Application and its Corrected Application provides a designation of a specific beneficial use or a particular place where a beneficial use would

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decision in the first case; and the party against whom the doctrine is invoked must have had a full and fair opportunity to litigate the issues in the first case. *See* Community Protestants' Memorandum, p. 35.

occur. *See* pp. 19-20, *supra*. This litigation therefore does constitute re-litigation of the earlier proceeding addressing APR's Original Application. For that reason, litigation of this proceeding is precluded by the doctrine of *res judicata*.

b. In the alternative, the doctrine of collateral estoppel requires dismissal of APR's Corrected Application.

The doctrine of collateral estoppel precludes re-litigation of facts or issues that have actually been decided in an earlier proceeding conducted by a court or an administrative agency provided that specific conditions are met.[14] *See* Community Protestants' Memorandum, pp. 41-42, Contreras v. Miller Bonded, Inc., 2014-NMCA-011, ¶14, 316 P.3d 202, 206. Assuming *arguendo* that this is not a continuation of the earlier proceeding addressing APR's Original Application, each of these conditions is met, and the earlier rulings of the State Engineer and the District Court dismissing APR's Original Application require dismissal of APR's Corrected Application pursuant to the doctrine of collateral estoppel.

As the Community Protestants explained in their Memorandum, there are two separate proceedings, and APR was a party in the earlier proceeding and it is a party in this proceeding. The issue in this matter – whether the State Engineer is required to dismiss an APR Application because it fails to designate a specific beneficial use and a particular place of use for the water to be appropriated – is the same as the issue that was litigated in the first proceeding, and that issue was actually decided in the earlier proceeding. *See* Community Protestants' Memorandum, pp. 41-45, State Engineer's Denial Order, pp. 2-5, ¶¶5-11, 18-26, District Court Memorandum, pp. 15-32.

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[14] There must have been two cases involving two causes of action; the party to be estopped must have been a party to the first case; the issue in question must have been litigated in the first case; and the issue in question must have been decided in the first case.

In its Response, APR has presented three allegations to the effect that the doctrine of collateral estoppel does not require the State Engineer to dismiss APR's Corrected Application. Each of these allegations is unpersuasive.

First, APR alleged that the issue presented by its Corrected Application is not the same as the issue that was presented by its Original Application. APR's Response, pp. 46-47. As the Community Protestants have explained, however, both the State Engineer and the District Court dismissed APR's Original Application because it failed to designate the specific purpose and the particular place of use of the water to be appropriated. As the Community Protestants also have explained, APR's Corrected Application too fails to designate both a specific purpose and a particular place for use of the water at issue, and APR has provided no information to the contrary. *See* pp. 13-15, *supra*.

Second, APR has asserted that its Corrected Application cannot be subject to dismissal pursuant to the doctrine of collateral estoppel because APR's Original Application was dismissed by the State Engineer and the District Court without prejudice. However, nothing in the State Engineer's Order or the District Court's ruling indicated that APR would be able to file a new application without regard to whether it complied with applicable law. In fact, the District Court specifically stated that the dismissal without prejudice allowed APR to "submit an application that meets the statutory requirements of specificity for beneficial use and place of use." District Court Memorandum, p. 21.

There is therefore no merit to APR's assertion that the dismissals without prejudice preclude evaluation of its Corrected Application to determine whether it complies with applicable law by designating a specific beneficial use of the water to be appropriated and the particular place where that use would occur.

Third, APR has asserted that the Court of Appeals, the Supreme Court, and the District Court have all rejected the Community Protestants' position that APR's Corrected Application must be dismissed. As the Community Protestants have explained (p. 19, *supra*), however, none of the actions of those Courts cited by APR indicated anything about the merits of APR's Corrected Application.

For these reasons, the doctrine of collateral estoppel does require that the State Engineer dismiss APR's Corrected Application because of its failure to designate the specific beneficial use of the water to be appropriated and the particular place where that use would occur.

III. There is no merit to APR's assertion that the State Engineer must conduct an evidentiary hearing on its Corrected Application.

APR has asserted that the State Engineer must conduct an evidentiary hearing on its Corrected Application. APR's Response, p. 15. That assertion is without merit.

First, the issue raised by APR – whether it is entitled to an evidentiary hearing – is governed by section 72-2-16, NMSA 1978, which provides:

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

NMSA 1978, §72-2-16.

As the Court of Appeals has pointed out:

> In administrative proceedings of the type at issue in this case, the language of the statute does not guarantee either party a right to a hearing before the state engineer enters a decision. The state engineer acknowledges as much when he notes that he may enter a decision without the benefit of a hearing. ... The plain language of the statute establishes that the state engineer's authority to hold a hearing before he enters a decision is discretionary.

Derringer v. Turney, 2001-NMCA-075, ¶12, 131 N.M. 40, 44-45.

Second, this ruling by the Court of Appeals was confirmed in the later case of D'Antonio v. Garcia, 2008-NMCA-139, 145 N.M. 95. There, the Court ruled that section 72-2-16 does not provide an absolute right to a hearing but only gives a party an opportunity to request a hearing after the State Engineer has made a decision. 2008-NMCA-139, ¶¶8-9, 145 N.M. 98. Moreover, the State Engineer's decision in D'Antonio v. Garcia was a decision based on a motion for summary judgment (*Id.*), which is what the Community Protestants have filed in this proceeding.

Finally, the case cited by APR as support for its assertion, Environmental Improvement Division v. Aguayo, 1983-NMSC-027, 99 N.M. 497, did not address the obligations of the State Engineer in a proceeding addressing an application to appropriate ground water. Rather, the Aguayo case involved an action by the Environmental Improvement Division of the State Health and Environment Department to enjoin three individuals from using a liquid waste disposal system. 1983-NMSC-027, ¶1, 99 N.M. 498. That case did not interpret section 72-2-16, NMSA 1978 or otherwise address whether the State Engineer has an obligation to conduct an evidentiary hearing of the sort requested by APR. The Supreme Court's ruling in Aguayo therefore has no application to this matter.

IV. There is no public interest that indicates that APR's Corrected Application should not be dismissed.

APR also has asserted that dismissal of its Corrected Application would be contrary to the "public interest." This assertion is without merit for several reasons.

First, APR has cited nothing in applicable law, and there is nothing in applicable law, to indicate the specific requirements for an application to appropriate ground water set forth in section 72-12-3 NMSA 1978 are pre-empted by a determination, much less an allegation, that a proposed appropriation of water is in the public interest. In fact, the role of a determination

addressing the public interest in New Mexico's water law is only a negative role. Section 72-12-3.E, NMSA 1978 indicates that the State Engineer may not grant an application to appropriate water unless he determines that the appropriation would not be contrary to the public welfare. A determination that a proposed appropriation is allegedly in the public welfare or the public interest is not a basis for approving an appropriation.

Second, APR's assertion is based on unsupported statements about the need for water in the area characterized as "the Middle Rio Grande." APR has asserted that "the Middle Rio Grande" is the "economic center of the State and New Mexico's fastest growing area," but APR has provided no documentary or other evidence to support that assertion. APR's Response, pp. 50-51. Moreover, APR's Corrected Application purports to indicate that the water to be appropriated would be used in seven counties, only one of which is Bernalillo, and along a 140+ mile pipeline, the majority of which is not in "the Middle Rio Grande." APR's assertion that its project is necessary for the benefit of "the Middle Rio Grande" is therefore belied by its own Corrected Application.

Third, there is no merit to APR's assertion that the "public interest" is determined solely by reference to the purported needs of "the Middle Rio Grande" without reference to the needs of other areas of the state. As is explained below, the water that APR seeks to appropriate from the San Augustin Basin is being used by governmental entities and private individuals in that Basin. APR's assertion that the needs of these entities and individuals are outweighed by the purported needs of "the Middle Rio Grande" is without any basis.

Fourth, APR has asserted without any supporting documentary or other evidence that its proposed appropriation of ground water is in the public interest because the water it seeks to appropriate is not being used and the Community Protestants want to keep it in the ground

"unused." APR Response, pp. 35-36. A review of several of the protests filed in response to APR's Original Application and its Corrected Application indicates that this is not accurate.

For example, protests filed by several governmental entities refer to their use of ground water and to the use of ground water by their constituents. The protest filed by Catron County on December 14, 2007 includes a list of almost 30 wells serving County facilities that would be adversely impacted by APR's proposed appropriation of ground water. Catron County protest, Exhibit A. The Village of Magdalena's protest dated December 14, 2007 asserts that APR's appropriation of ground water would draw down the Village's water source. Village of Magdalena protest, p. 1. The protest filed by the Socorro Soil and Water Conservation District on December 12, 2007 points out that the "Village of Magdalena pumps their [*sic*] groundwater supply ... from the eastern fringe" of the San Agustin Basin, and that "Numerous wells currently in production in this area will be impacted with this large a draw down of the aquifer." Socorro Soil and Water Conservation District protest, p. 2. Socorro County's protest filed on October 5, 2016 states that a new appropriation will impair established "ground water rights of the County's inhabitants." Socorro County protest, p. 2. The City of Socorro's protest dated September 22, 2016 expresses concern about the impact of APR's proposed appropriation on the City's water supply from its spring and adverse effects on the water supplies of residents of Catron county who frequent businesses in Socorro. City of Socorro protest, p. 1.

In addition, similar concerns were expressed by one homeowners' association and by many individuals. The Abbe Springs Ranches Homeowners' Association expressed concern about the impacts of APR's proposed project on the wells of the members of the Association. Abbe Springs Ranches Homeowners' Association, Inc. protest dated August 25, 2008. Individual protestants who expressed such concerns include but are not limited to John Dodds

and Eileen Dodds, Candace Inman, Peter Pache, Ray Pittman and Carol Pittman, Norbert and Christine Steiger, and Carmela Warner. *See* protests filed by John Dodds and Eileen Dodds (August 26, 2008), Candace Inman (August 26, 2008), Peter Pache (September 2, 2008), Ray Pittman and Carol Pittman (September 2, 2008), Norbert and Christine Steiger (September 22, 2008), and Carmela Warner (September 2, 2008).

There is therefore no basis for APR's allegation that the public interest would be served by its proposed appropriation of the ground water in the San Augustin Basin because that water is not being used. Moreover, whether the water at issue is "being used" has no bearing on the lack of merit of APR's Corrected Application. Even if the water were not "being used," that does not excuse the Corrected Application's failure to comply with applicable statutory requirements.

Fifth, APR has asserted that its Corrected Application should not be dismissed because New Mexico law favors "determination of disputes on their merits rather than on blind compliance with alleged technical deficiencies." APR Response, p. 51. Even disregarding this statement's implication that the State Engineer and the District Court were "blind" when they dismissed APR's Original Application, APR's allegation is without merit. APR's position is that a ruling on an application to appropriate ground water based on its failure to designate a specific purpose and particular place of use for the water to be appropriated is not a ruling on "the merits" but is instead a ruling based on "technical deficiencies." That position is clearly at odds with Article XVI, §3 of the New Mexico Constitution, NMSA 1978, §72-1-2, NMSA 1978, §72-12-3.A and rulings of the Supreme Court, the Court of Appeals, and the District Court. *See* State *ex rel.* Martinez v. City of Las Vegas, 2004-NMSC-009, ¶34, 135 N.M. 375, 386, Carangelo v.

Albuquerque-Bernalillo County Water Utility Authority, 2014-NMCA-032, ¶35, 320 P.3d 492, 503, District Court Memorandum, pp. 19-20.

Sixth, APR has asserted incorrectly that granting the Community Protestants' Motion would deny APR its rights but denying the Motion would not affect any rights. This assertion is not accurate. The Community Protestants have a right to have APR's Corrected Application dismissed because it is facially invalid, and denial of the Motion would deprive the Community Protestants of the right to have the laws of New Mexico be enforced by the agency entrusted with their enforcement. In addition, because APR's Corrected Application is facially invalid, the Community Protestants have the right to avoid the expense and trouble of participating in a proceeding to address the vaguely postured hydrologic and other issues pertaining to the Corrected Application. The complete lack of specificity in the Corrected Application forces the Community Protestants to prepare to address highly uncertain claims in this proceeding. The Community Protestants have a legitimate interest in limiting their participation to issues that impact their existing water rights, including the sustainability of the source of water on which their rights depend.

In addition, the Community Protestants have the right to proceed in the manner established by the Hearing Officer in the August 10, 2017 Scheduling Order. That Order did not accept the two stage process requested by APR's Corrected Application, in which hydrologic issues would be considered before issues addressing the facial invalidity of the Application are considered. APR's assertion that the Community Protestants' Motion should be denied so that hydrologic issues may be considered first is effectively a repeat of the Corrected Application's request for a two stage process. However, the Scheduling Order indicates that it will be changed only if the parties "jointly file a stipulated schedule" for proceeding in a different manner No

such joint stipulation has been filed, and the Community Protestants hereby provide notice that they will not stipulate to the two stage hearing process that APR has requested.

For these reasons, there is no merit to APR's assertion that denial of the Community Protestants' Motion is in the public interest.

V. The State Engineer should disregard the allegations presented in APR's Reply to the Water Rights Division's Response to the NMELC Protestants Motion for Summary Judgment.

Finally, APR has filed a Reply to the Response to the Community Protestants' Motion filed by the Water Rights Division (APR's Reply). Although the title of APR's Reply purports to indicate that it addresses points raised by the Water Rights Division, APR's Reply in fact supplements APR's responses to points raised by the Community Protestants in their Motion. *See, e.g.*, assertions concerning dismissal of APR's Corrected Application (APR's Reply, pp. 6-7), speculation (*Id.*, p. 8), use of water (*Id.*, p. 10), APR's proposed use of the water it plans to appropriate (*Id.*, pp. 15-16, including footnote 4 on p. 16), possible conditions on approval of APR's application (*Id.*, pp. 20-21), and the purported effects of denying APR's Corrected Application (*Id.*, pp. 21-22).

This effort by APR to supplement its Response to the Community Protestants' Motion is inappropriate. Moreover, it violates the October 6, 2017 Order Adopting Briefing Schedule issued by the Hearing Officer that established the briefing schedule for addressing the Community Protestants' Motion. That Order adopted a deadline for filing joinders in support of the Community Protestants' Motion, a deadline for filing responses to the Motion, and a deadline for the Community Protestants counsel (NMELC) to file a reply in support of the Motion. There is nothing in the Order authorizing APR to file a reply.

Because the Hearing Officer's Order did not authorize APR to file a reply to the Water Rights Division's Response to the Community Protestants' Motion, and because the Hearing Officer's Order did not authorize APR to supplement its Response to the Community Protestants' Motion, the State Engineer should refuse to consider APR's Reply and should disregard its contents.

Conclusion

APR's Corrected Application is invalid on its face. It fails to designate both a specific beneficial use for the water it seeks to appropriate and a particular location where the water would be used, and it must be dismissed for those reasons. In addition, the previous rulings of the State Engineer and the District Court addressing APR's Original Application mandate that the State Engineer dismiss APR's Corrected Application.

The Community Protestants' Motion therefore should be granted, and the State Engineer should dismiss the Corrected APR Application.

Dated: December 4, 2017.

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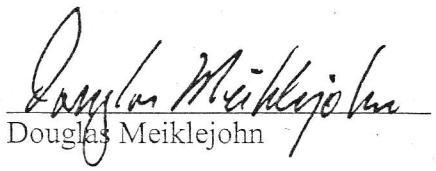
Certificate of Service

I certify that copies of the foregoing Reply were mailed on December 4, 2017 to the parties listed by the State Engineer's Office as entitled to receive notice in this proceeding.



Douglas Meiklejohn