IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RAY C. AND CAROL W. PITTMAN.

Petitioners,

vs. No.: _____

SCOTT A. VERHINES, New Mexico State Engineer,

Respondent,

and

AUGUSTIN PLAINS RANCH, LLC,

Real Party in Interest.

SUPREME COURT OF NEW MEXICO
FILED
SEP 22 2014

ORIGINAL PROCEEDING IN MANDAMUS

VERIFIED PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY

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Compliance with Rule 12-504(g)(3) NMRA: Counsel certifies that he prepared this Petition in Times New Roman font and that it contains 5,914 words.

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Ray C. and Carol W. Pittman ("Petitioners") submit this Petition under Article VI, Section 3 of the New Mexico Constitution. Petitioners respectfully request the Court to order the New Mexico State Engineer to reject an application to appropriate 54,000 acre-feet of groundwater per year ("54,000 AFY") that the Augustin Plains Ranch, LLC ("APR") submitted to the Office of the State Engineer ("OSE") on July 14, 2014 ("2014 Application"). The 2014 Application is identical in all material respects to an earlier failed application that APR originally submitted on October 9, 2007 ("2007 Application"). The 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.

SUMMARY OF THE CASE

I. The 2014 Application is materially identical to the 2007 Application.

The 2007 and 2014 Applications (attached as Exhibits A and B, respectively) describe the same speculative project in which APR seeks to monopolize a tremendous amount of public water,[1] not for any particular beneficial use, but for the purpose of possible future sales to unspecified third parties in a large area of the State. APR proposes to pipe water to unspecified locations in one

[1] 54,000 AFY is approximately equal to half the amount of water consumed each year by the entire City of Albuquerque.

to seven New Mexico counties. APR itself will not use the water, nor has any third party agreed to use it. In fact, APR's Applications do not reveal how, where, how much, or by whom the requested water will be used. Under each Application, all or none of the water might be discharged into the Rio Grande for use in Texas; all or none might be used by municipalities in one to seven counties; or all or none might be used for agricultural, commercial or industrial purposes by governmental entities, individuals or businesses in one or more of seven counties.

II. The issue presented is purely legal and of great public importance.

This Petition is based solely on the attached exhibits and undisputed material facts enumerated below. The issue presented is purely legal and worthy of this Court's consideration, because it implicates fundamental constitutional questions of great public importance. Petitioners ask the Court to determine whether public water shall remain open to appropriation for beneficial use, as required by New Mexico's Constitution; or, whether public water can be monopolized by speculators, not for their own use, but for profitable sales in future markets. APR's 2007 Application drew over 900 Protestants from almost every sector of New Mexico's population, including Petitioners and hundreds of other individuals, acequias, irrigation and conservation districts, corporations, and local, state, federal, and tribal governments. [Exhibit E] Millions of dollars and the future of New Mexico's public water are at stake. APR is seeking investors and claims to

have already spent three million dollars of investors' money on a potentially unlawful project. [Exhibit B at 13; Exhibit O] *See Young & Norton v. Hinderlider,* 1910-NMSC-061, ¶24, 15 N.M. 666, 110 P. 1045 (public interest requires protecting investors "against making worthless investments in New Mexico.")

III. 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.

Both the State Engineer and a District Court determined that the 2007 Application was invalid on its face (Exhibits C and D, respectively), because the Application failed to designate any particular purpose or place of beneficial use or end user. In the words of the State Engineer:

> The application was denied because it was vague, over broad, lacked specificity, and the effects of granting it cannot reasonably be evaluated; problems which are contrary to public policy.

[Exhibit E] In upholding the State Engineer's denial, the District Court held:

> The [2007] application violates the underground water permitting statute and contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

[November 14, 20012, Memorandum Decision on Motion for Summary Judgment ("Memorandum Decision") (Exhibit D)] The District Court also ruled that the State Engineer had a non-discretionary duty to reject the 2007 Application:

> Because [APR] failed to specify beneficial uses and places of use in its application and chose to make general statements covering nearly all possible beneficial uses and large swaths of New Mexico for its

> possible places of use, *the State Engineer had no choice but to reject the application*. The application does not reveal a present intent to appropriate water, but merely to divert it and explore specific appropriations later.

[Exhibit D at 20 (emphasis added)]

The Memorandum Decision remains in effect. Although APR appealed the Decision, the Court of Appeals dismissed the appeal at the request of APR and the State Engineer just two days before oral argument. [Exhibit F] The State Engineer and APR successfully argued that APR's 2014 Application rendered the appeal on the 2007 Application moot. The State Engineer also told the Court of Appeals that he will evaluate APR's 2014 Application "without regard to his prior decision" on the substantively identical 2007 Application. [Exhibit G]

The States of Nevada, Utah, and Colorado have the same basic water law as New Mexico, and the Supreme Courts in each of these States have confirmed that beneficial use – not speculation – is the basis of a water right. These decisions are grounded in the common law "principle of beneficial use," which "is based on imperative necessity … and aims fundamentally at definiteness and certainty …." *State ex rel. Martinez v. City of Las Vegas*, 2004 NMSC 9, ¶ 34, 135 N.M. 375 (internal quotes omitted). New Mexico's constitutional and statutory pronouncements concerning beneficial use are merely declaratory of this common law, and therefore, must be interpreted in conformity with its principles.

Consistent with the common law, the Legislature required applications to set forth sufficient information to demonstrate the applicant's specific intent to appropriate water for beneficial use. Among other things, all applications must disclose "(2) the beneficial use to which the water *will be applied*" and "(6) the place of the use for which the *water is desired*." NMSA 1978, § 72-12-3(A)(2001) (emphasis added). APR's 2007 and 2014 Applications fail to comply with these statutory requirements, and therefore, they fail to express the requisite intent to appropriate water. Petitioners respectfully request the Court to order the State Engineer to promptly reject APR's 2014 Application, as required by law. NMSA 1978, § 72-12-3(C) ("No application shall be accepted by the state engineer unless it is accompanied by all the information required by" Section 72-12-3(A)).

IV. A writ of mandamus and stay are necessary and will not interfere with any pending administrative proceeding.

The State Engineer's representations to the Court of Appeals regarding the 2007 Application and the issue of mootness show that he will not promptly reject APR's 2014 Application, as mandated by law, unless ordered to do so by this Court. Moreover, the State Engineer has accepted similar invalid applications and commenced administrative hearings on such applications. [Exhibits A and H] These hearings involve two lengthy multi-party proceedings—an administrative proceeding before the Office of the State Enigneer ("OSE") and another *de novo* proceeding before a district court, the outcome of which may be appealed as of

right to the Court of Appeals. APR's highly controversial 2007 Application was in active litigation for seven years and would still be active today had the Court of Appeals not dismissed the case. Petitioners seek a writ of mandamus to avoid the same prolonged, expensive, and wasteful litigation regarding the 2014 Application.

The State Engineer has not published notice of the 2014 Application or commenced any administrative hearing regarding it. Therefore, the requested writ will not violate separation of powers, because it will not interfere with any existing administrative proceeding. Petitioners request a stay to maintain this *status quo* and to prevent irreparable harm. Neither the State Engineer nor APR will be harmed if the stay is granted.

UNDISPUTED MATERIAL FACTS

1. In its 2007 Application, as amended (Exhibit A), and again in the 2014 Application (Exhibit B), APR requests a permit to divert and consume 54,000 AFY to be pumped from 37 wells located on APR's property in Catron County. [Exhibit A at 1 and 4; Exhibit B at 2]

2. The 54,000 AFY of water APR requested in each Application is not based on any particular need for water or beneficial use. As described by APR in its original 2007 Application, the number is based on an estimated amount of water in aquifer storage. [Exhibit I]

3. In the 2007 and 2014 Applications, APR seeks a permit that is not limited to any specific beneficial use. In each Application, APR seeks the right to provide water to third parties for almost any possible use, as follows:

A. The 2007 Application identifies potential purposes of use as "domestic," "livestock," "irrigation," "municipal," "industrial," "commercial," "environmental, recreational, subdivision and related; replacement and augmentation." [Exhibit A at 1 ¶5 (purpose of use)] APR also states:

> 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 [seven county] area designated in Attachment B.

[Exhibit A at 2 ¶7; *see also* Exhibit I at 2 (describing alleged "extraordinary potential uses")]

B. The 2014 Application identifies the potential purposes of use as "municipal," "industrial," "commercial," "offset of surface water depletions, replacement, sale and/or lease." [Exhibit B at 1 ¶2] APR also states:

> The water will be put to use by municipal, industrial and other users along the pipeline route ….
>
> …
>
> This [2014] Application is being filed in order to obtain a permit to appropriate 54,000 acre-feet per year from 37 wells. The water will be transported by pipeline from the points of diversion to various users [in seven counties] along the pipeline route shown on Exhibit 4 to the Attachment.

[Exhibit B at 3 ¶¶ 5(g) and 6]

4. In the 2007 and 2014 Application, APR identifies the "place of use" as follows:

> 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.

[Exhibit A at 7; Exhibit B at 2, 15]

5. After the State Engineer accepted the 2007 Application and notice was published, more than 900 persons objected:

> The application originally had over 900 protestants, including the NM Interstate Stream Commission, the Middle Rio Grande Conservancy District, US Bureau of Reclamation; NM Dept of Game and Fish, Gila and Cibola National Forests, Catron County, Socorro County, Luna Irrigation Ditch, Monticello Irrigation District, several adjoining ranches, over 100 individuals and the Pueblos of: Santa Ana, Zuni, San Felipe, Isleta, Sandia, Acoma, Kewa (Santo Domingo) and the Navajo Nation.

[Exhibit E]

6. Petitioners along with approximately 80 other objectors (collectively referred to as "Protestants") filed a motion to dismiss the 2007 Application, arguing that the Application was invalid on its face.

7. On March 30, 2012, the State Engineer granted Protestants' motion and denied the 2007 Application. The State Engineer characterized an application for a permit to appropriate water as "a request for final action," such that the applicant must be "ready, willing and able to proceed to put water to beneficial

use" at the time of filing. [Exhibit C at 3-4 ¶¶17-19] The 2007 Application failed to meet this criteria and was thus too vague to consider:

> The face of the [2007] Application requests almost all possible uses of water … at various unnamed locations within [seven counties] … but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation ….

[Exhibit C at 2-3 ¶8; *id*. at 4 ¶24 (2007 Application "should not be considered"); *see also* Exhibit E ("The [2007] application was denied because it was vague, over broad, lacked specificity"); Exhibit J at 32-35 (answer brief of State Engineer arguing that neither OSE nor Protestants could ascertain APR's intended use of water from APR's vague 2007 Application).]

8. Further explaining his reasons for denying the 2007 Application as facially invalid, the State Engineer described "reasonable applications" as "those that identify a clear purpose for the use of the water" and "include specifics as to the end user of the water." [Exhibit E at 2]

9. Like the 2007 Application, the 2014 Application does not "identify a clear purpose of use" or the "end user of the water." [Exhibit B] Although the 2014 Application includes two letters from the City of Rio Rancho, neither letter commits the City to purchasing any amount of water. [Exhibit K ("Should [APR] … succeed in the application process and successfully put in place a delivery system to deliver water to Rio Rancho, Rio Rancho would most certainly consider [becoming a] … customer for this water.")

10. After the State Engineer denied the 2007 Application "without prejudice" [Exhibit C at ¶ 25], APR appealed to the Seventh Judicial District. Protestants filed a motion for summary judgment against the APR, again arguing that the 2007 Application was invalid on its face.

11. On November 14, 2012, the District Court issued a Memorandum Decision granting Protestants' motion. [Exhibit D] The District Court characterized the "sole issue on appeal" as "whether the State Engineer was justified in denying [the 2007] application … without holding an evidentiary hearing." [Exhibit D at 1] As already described, the District Court held that the State Engineer had "no choice but to reject the application" because it "does not reveal a present intent to appropriate water …." [Exhibit D at 20]

12. On January 3, 2013, APR appealed the District Court's ruling to the Court of Appeals.

13. In answer to APR's claim that it could delay disclosing any specific purpose or place of beneficial use until an evidentiary hearing was held, the State Engineer told the Court of Appeals: "This is not the way the application and protest process is intended to work." [Exhibit J at 34]. The State Engineer also stated that "an application [to appropriate water] must set out the elements of [the] water right that would actually be permitted." [Exhibit J at 32]

14. APR's 2014 Application does not "set out" the intended purpose or place of beneficial use or the other "elements" of any specific water right. APR again proposes to delay designating any specific purpose or place of use until an evidentiary hearing is held, and it proposes that this hearing be conducted in two stages:

A. In "Stage 1," the parties (APR, the State Engineer, and dozens of Protestants) would litigate "hydrological issues" only, before they know how, where, how much, or by whom water would actually be used. [Exhibit B at 14]

B. In "Stage 2," APR would finally reveal "the individual purposes of use, places of use and amounts for each use." *Id*. Stage 2 would occur as many as 12 months after Stage 1. *Id*. No deadline would be imposed on either the beginning or duration of Stage 1.

15. On July 14, 2014, APR filed its 2014 Application with the State Engineer. [Exhibit B] After learning of the 2014 Application through a newspaper article, the Court of Appeals on its own motion ordered the parties to file simultaneous supplemental briefs on whether the 2014 Application rendered APR's appeal on the 2007 Application moot. [Exhibit L]

16. On August 1, 2014, the State Engineer filed a supplemental brief asserting that the 2014 Application superseded the 2007 Application and rendered the appeal on the 2007 Application moot. [Exhibit G] The State Engineer also

informed the Court that his prior denial of the 2007 Application had no relevance to his consideration of the substantively identical APR's 2014 Application:

> The State Engineer's decision on the [2007] application is no longer relevant, since *the State Engineer will review APR's [2014] application without regard to his prior decision*, just as he would review any new application to appropriate water.

[Exhibit G at 2] Finally, the State Engineer requested the Court of Appeals to vacate the District Court's Memorandum Decision. [Exhibit G at 3] The Court of Appeals did not grant the State Engineer's request. The Memorandum Decision, therefore, remains in effect.

17. Protestants also filed a supplemental brief on the issue of mootness. They argued that the appeal was not moot, because the 2007 and 2014 Applications are substantively identical, and therefore, gave rise to the identical controversy among the parties. [Exhibit M]

18. On August 19, 2014, based solely on the representations of the State Engineer and APR regarding the 2014 Application, the Court of Appeals dismissed APR's appeal as moot. [Exhibit F]

19. On September 5, 2014, after the State Engineer and APR had persuaded the Court of Appeals that the mere filing of the 2014 Application justified dismissal of the appeal, OSE staff represented to counsel that APR's 2014 Application had not yet been "reviewed for completeness." [Exhibit N]

20. Petitioners were among the Protestants who filed the dispositive motions leading to the denial of APR's 2007 Application by the State Engineer and on appeal by the District Court. They reside next to APR's property in Catron County, New Mexico, and own water rights that they allege will be impaired by APR's proposed water project.

ARGUMENT

The Court has original jurisdiction to hear petitions for writ of mandamus under Article VI, Section 3 of the New Mexico Constitution. "This Court will exercise its original jurisdiction in mandamus when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal." *State ex rel. King v. Lyons*, 2011-NMSC-004, 20-32, 149 N.M. 330. This Petition meets the *Lyons* standards.

I. THE ISSUE PRESENTED IS PURELY LEGAL AND IMPLICATES FUNDAMENTAL CONSTITUTIONAL QUESTIONS OF GREAT PUBLIC IMPORTANCE.

Every person who desires to establish a water right in a declared underground basin must first apply to the State Engineer for a permit to appropriate groundwater. NMSA 1978, § 72-12-3(A). The issue presented is whether these

applications must, on their face, request a specific amount of water that "will be applied" to a specific purpose and place of beneficial use; or, whether it is sufficient to request as much water as possible and list numerous possible uses and end users within a large area of the state. The latter approach, which APR has taken, would allow the applicant to speculate in future water markets and ultimately sell water to the highest bidder(s). If the State Engineer were to approve such an application, as written, he would effectively grant the applicant a profitable monopoly in public water, allowing it to dictate how, where, when, and by whom a tremendous amount of water is used and at what price.

The issue presented implicates fundamental constitutional questions of great public importance and interest. As the District Court held regarding the 2007 Application, APR's failure to designate any specific purpose or place of use or end user "contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution." [Exhibit C at 14] APR's 2014 Application is substantively no different than its 2007 Application. The public's strong reaction to the 2007 Application, which drew over 900 objectors, demonstrates the importance of the issue presented and the public's interest in the issue. [Exhibit E] Moreover, the Supreme Courts of Colorado, Utah and Nevada have all addressed the issue and all have ruled against speculation in favor of beneficial use.

A. APR's 2014 Application contradicts the principle of beneficial use.

As declared in New Mexico's Constitution, "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3; NMSA 1978, § 72-12-2 (1953) (same declaration regarding underground water basins). Just like its 2007 Application, APR's 2014 Application contradicts the declared principle of beneficial use, because the 54,000 AFY requested is not based on, measured by, or limited to any beneficial use. As described by the District Court regarding the 2007 Application:

> [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.

[Exhibit D at 27**]** Based on the face of the 2014 Application, one can only speculate about how, where, and by whom a tremendous amount of public water might be used. This uncertainty contradicts the "principle of beneficial use," which "aims fundamentally at definiteness and certainty …." *Las Vegas*, 2004 NMSC 9, ¶ 34.

The Supreme Courts in other prior appropriation states have addressed the issue of speculation verses beneficial use. These Courts uniformly hold that speculative water projects, in which the would-be appropriator has no intent to use water itself and no contract to provide water to a third party, violate the principle of beneficial use. *Bacher v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 1119,

146 P.3d 793, 799 (Nev. S.Ct. 2006) ("Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State's water law jurisprudence"); *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 2004 UT 67, ¶51, 98 P.3d 1 (Utah S.Ct. 2004) ("a diversion of water merely to serve purposes of speculation or monopoly will not constitute beneficial use"); *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 417, 594 P.2d 566, 568 (1979) ("Our constitution guarantees a right to appropriate, not a right to speculate"). In a case originating in New Mexico, the Tenth Circuit Court of Appeals cited *Vidler* in ruling that Albuquerque "cannot take the water now with a mere hope of possible sales in the future." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1134 (10th Cir. 1981).

B. APR's 2014 Application contradicts public ownership of water.

"Unappropriated water" is "declared" by New Mexico's Constitution "to belong to the public and to be subject to appropriation for beneficial use …." N.M. Const. art. XVI, § 2; NMSA 1978, §§ 72-12-1 (same declarations regarding underground water basins). APR's 2007 and 2014 Applications contradict this declared principle of public ownership of water, because approval of the Applications as written would grant APR "incidents of ownership over public water," giving APR the power to control how, where, and by whom the water is

appropriated. [Exhibit D at 31-32] The State Engineer cannot grant any private entity such control over how the public uses its own water without breaching the trust in which the State holds this water. *See State ex rel. Bliss v. Dority*, 1950-NMSC-066, ¶11, 55 N.M. 12 ("The public waters of this state are owned by the state as trustee for the people"); *see also New Mexico v. GE*, 467 F.3d 1223, 1243 (10th Cir. 2006) (describing New Mexico's "codification of the public trust doctrine as to groundwaters").

Over a century ago, this Court rejected a similar attempt to gain private control over public water, because:

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

Millheiser v. Long, 1900-NMSC-012, ¶31, 10 N.M. 99. Western states adopted prior appropriation specifically to prevent monopolization of essential water supplies:

> The reasons that the doctrine of prior appropriation was adopted in all of the western states except California were … to utilize scarce water [and] … to prohibit the monopoly inherent in the riparian doctrine.

Cartwright v. Public Serv. Co. 1958-NMSC-134, ¶129, 66 N.M. 64, *overruled* by *City of Las Vegas*, 2004 NMSC 9 (J. Federici dissenting). The United States Supreme Court described the common law of prior appropriation, which has long applied to federal lands, as follows:

> [The] right to water by prior appropriation … must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.

Basey v. Gallagher, 87 U.S. 670, 683 (1875). More recently, the Colorado Supreme Court held that prior appropriation "circumscribes monopolist pitfalls" by "making the public's water resource available to those who [have] actual need for water, in order to curb speculative hoarding." *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307, 313 (Colo. S.Ct. 2007). APR's 2014 Application cannot be approved, as written, without contradicting these fundamental principles.

II. THE STATE ENGINEER HAS A NON-DISCRETIONARY DUTY TO REJECT APR'S 2014 APPLICATION.

As held by the District Court regarding the 2007 Application, the State Engineer has "no choice but to reject the" 2014 Application. [Exhibit D at 20] The State Engineer's non-discretionary duty to reject the Application is grounded in the fundamental principle of beneficial use declared in New Mexico's Constitution and statutes, as cited above. "[B]eneficial use of water … is of the greatest importance to the state …," *Kaiser Steel Corp. v. W. S. Ranch Co*, 1970-NMSC-043, ¶ 15, 81 N.M. 414, and the "principle of beneficial … aims fundamentally at definiteness and certainty …." *Las Vegas*, 2004 NMSC 9, ¶ 34.

Every person desiring to appropriate groundwater in a declared underground basin must first apply to the State Engineer for a permit, which is the necessary "first step" to establishing a water right. *Hanson v. Turney*, 2004-NMCA-069, ¶9, 136 N.M. 1. Under prior appropriation, water rights are defined and limited by specific elements of beneficial use, including the amount, purpose and place of use. NMSA 1978, § 72-4-19(1953). Accordingly, a permit issued by the State Engineer sets out the specific elements of beneficial use, including the amount, purpose and place of use, which will define and limit the applied-for water right. 19.27.1.10 NMAC ("The application and permit limit the nature and extent of the water right"); 19.26.2.7 NMAC (a permit "authorizes the diversion of water from a specific point of diversion, for a particular beneficial use, and at a particular place of use"); *Hanson*, 2004-NMCA-069, ¶9.

The State Engineer told the Court of Appeals that "an application [to appropriate water] must set out the elements of [the] water right that would actually be permitted." [Exhibit J at 32] This correct statement of the law is based on the express application submittal requirements established by the Legislature, as follows:

> In the application, the applicant shall designate:
>
> (1) the particular underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated;
>
> (2) the beneficial use to which the water will be applied;

(3) the location of the proposed well;

(4) the name of the owner of the land on which the well will be located;

(5) the amount of water applied for;

(6) the place of the use for which the water is desired; and

(7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land.

NMSA 1978, § 72-12-3(A). The remaining essential element of the applied-for water right – priority – relates back to the date the application was filed, "subject to the acceptance of the application and the issuance of a permit by the state engineer and the timely application of water to beneficial use." § 19.27.1.9 NMAC.

The Legislature imposed a non-discretionary duty on the State Engineer to reject applications that fail to comply with statutory submittal requirements:

> No application *shall* be accepted by the state engineer unless it is accompanied by all the information required by Subsections A and B of [Section 72-12-3].

NMSA 1978, § 72-12-3(C) (emphasis added); *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 ("'shall' indicates that the [statutory] provision is mandatory"). Moreover, the State Engineer imposed on himself a duty to "promptly" reject non-compliant applications and to notify the applicant of required changes. 19.27.1.11 NMAC. If the applicant refiles a

corrected application within 30 days of notice, its application retains the priority of the original filing; otherwise, it is treated like a new application. *Id*.

Pursuant to the foregoing authorities, the State Engineer has a duty to "promptly" reject APR's Application, because the Application does not designate any specific purpose or place of "beneficial use to which water will be applied." Instead, the Application vaguely describes several possible uses to which 54,000 AFY *might* be applied by various third parties in one or more of seven counties. As held by the District Court, this uncertainty regarding APR's intended use of water violates statutory submittal requirements and contradicts the principle of beneficial use declared in New Mexico's Constitution and statutes.

As repeatedly held by this Court, New Mexico's constitutional and statutory enactments regarding beneficial use are "declaratory" of the common law of prior appropriation. *See, e.g., Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 20, 147 N.M. 523; *City of Albuquerque v. Reynolds*, 1962-NMSC-173, ¶37, 71 N.M. 428. Declaratory statutes, such as those governing the appropriation of water in New Mexico, do "not take away the common law in relation to the same matter." *State v. Trujillo*, 1928-NMSC-016, ¶11, 33 N.M. 370.[2] Accordingly, these statutes "must

[2] This holding in *Trujillo* was cited in the *Yeo v. Tweedy*, 1929-NMSC-033, ¶8, 34 N.M. 611, in which the Court held the first groundwater code "declaratory" of the common law.

be interpreted in conformity with [the common law] principles" that they declare. *Bell v. Dennis*, 1939-NMSC-045, ¶14, 43 N.M. 350.

Under the common law, the appropriator's intent to apply water to a specific purpose and place of beneficial use together with notice of that intent are key elements of every appropriation:

> Appropriation of water is held to be the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable purpose.

Turley v. Furman, 1911-NMSC-030, ¶10, 16 N.M. 253. "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 [one] can only acquire a perfected right to so much water as [one] applied to beneficial use." *Cartwright v. Public Serv. Co.*, 1958-NMSC-134, ¶139 (J. Federici, dissenting). Following application of water to the "specified purpose," the priority of the resulting right related back to the date on which notice of the appropriator's intent was first provided. *Farmers Dev. Co. v. Rayado L. & I. Co.*, 1923-NMSC-004, ¶26, 28 N.M. 357; *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, ¶¶ 12-14, 68 N.M. 467.

Under the groundwater code, the common law elements of intent and notice must be satisfied solely by the filing and publication of a permit application. NMSA 1978, §§ 72-12-3(A) and (D); § 19.27.1.9 NMAC. Therefore, the State Engineer must reject APR's 2014 Application, because the Application on its face

shows no intent to "take a specified amount of water for a specified purpose …." The Application shows only a general intent to speculate, to obtain a large amount of water to serve essentially any purpose that might arise anywhere in a vast area of the State. Such a vague intent has never been sufficient to establish a water right, and accordingly, cannot serve as the basis of a permit to appropriate water. Moreover, notice of APR's intent to appropriate water cannot be provided by publishing APR's 2014 Application, because the Application on its face expresses no such intent. And, without the requisite notice, there is no basis for relating priority back to the filing of APR's 2014 Application. Accordingly, the State Engineer has no discretion but to reject APR's 2014 Application.

III. PETITIONER'S HAVE NO OTHER MEANS TO EXPEDITIOUSLY RESOLVE THE ISSUE PRESENTED.

Petitioners and hundreds of other objectors sought resolution of the issue presented for seven years in connection with APR's 2007 Application. They finally succeeded in vindicating the principle of beneficial use in the administrative hearing before the State Engineer and, again, on *de novo* appeal before the District Court. They also fully briefed the issue on direct appeal in the Court of Appeals and were prepared to argue their cause in this Court on writ of certiorari. But less than two months before oral argument, APR filed its 2014 Application. APR and the State Enigneer used this filing to persuade the Court of Appeals to dismiss APR's Appeal, thus evading a published decision that might have appropriately

limited the State Engineer's discretion and discouraged investment in APR's speculative water project (and all similar projects).

Accordingly, Petitioners have no other means to expeditiously resolve the issue presented. Notwithstanding the State Engineer's representation to the Court of Appeals that the 2014 Application had such legal significance that it mooted an appeal, the OSE now states that the "application is still being reviewed for completeness." [Exhibit N] *But see Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶33, 285 P.3d 595 ("judicial estoppel [prevents] a party from playing fast and loose with the court") (internal quotes omitted). The OSE states further that no "time has been set" for publishing notice of the 2014 Application under Section 72-12-3(D) (Exhibit N). Moreover, even after notice is published, the administrative and judicial process will require years to play out, as the 2007 Application demonstrates. And even then, APR could file a *third* application, starting the process over again. Therefore, only this Court can expeditiously and finally resolve the issue presented.

IV. REQUEST FOR STAY

In order to maintain the *status quo* and prevent irreparable harm, Petitioners request the Court to enjoin the State Engineer from taking any action on the 2014 Application while the Court considers this Petition. The State Engineer has not ordered a pre-decision hearing on the 2014 Application, nor has he given APR the

right to a post-decision hearing by denying the Application. NMSA 1978, § 72-2-16(1973). Accordingly, under the *status quo*, the Court could grant the relief Petitioners request without interfering with a pending executive proceeding. *Cf. New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶1, 149 N.M. 42. Petitioners request a stay to preserve this *status quo* and prevent the irreparable harm that would result if Petitioners and hundreds of others are forced into multiple proceedings regarding the same speculative water project. *See Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶9, 128 N.M. 611 ("The object of the preliminary injunction is to preserve the *status quo* pending the litigation of the merits"); *De Soto v. De Jaquez*, 1940-NMSC-068, ¶4, 44 N.M. 564, (injunctive relief appropriate to prevent irreparable harm in the form of "a multiplicity of suits").

Neither the State Engineer nor APR will be prejudiced if the *status quo* is maintained pending resolution of this Petition. No administrative proceeding has commenced and APR has no specific plans to use water.

V. REQUEST FOR RELIEF

Petitioners request the 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. Petitioners further request the Court to enjoin the State Engineer from taking any action on the 2014 Application during the pendency of this proceeding.

Respectfully submitted:

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CERTIFICATE OF SERVICE: I certify that I caused a copy of the foregoing Petition to be served by hand-delivery to the following persons or their agents pursuant to NMRA 12-307 on the 22nd day of September, 2014:

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_____/s/_____
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