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BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATION BY CITY OF RIO RANCHO AND BOSQUE DEL SOL, LLC, FOR A PERMIT TO CHANGE PLACE AND PURPOSE OF USE AND CHANGE POINT OF DIVERSION FROM SURFACE WATER TO GROUNDWATER IN THE MIDDLE RIO GRANDE WATER BASIN IN THE STATE OF NEW MEXICO	**) Hearing Nos. 17-015 & 17-016) OSE File Nos. SD-08707 into RG-6745, *et al*) RG-6745 *et al* into SD-08707-T**

PROTESTANTS' RESPONSE IN OPPOSITION TO THE CITY OF RIO RANCHO'S AMENDED MOTION TO DISMISS OR FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION TO LIMIT ISSUES FOR HEARING

Protestants Middle Rio Grande Conservancy District, United States Bureau of Reclamation, the Pueblo of Santa Ana, the Pueblo of Sandia, the Pueblo of Isleta, and WildEarth Guardians (collectively, "Protestants"), by and through their counsel of record, hereby respond in opposition to the *City of Rio Rancho's Amended Motion to Dismiss or for Summary Judgment or, in the alternative, Motion to Limit Issues for Hearing*, filed March 19, 2018 and to co-applicant Bosque Del Sol, LLC's May 10, 2018 *Joinder in City of Rio Rancho's Motion to Dismiss or for Summary Judgment or, in the Alternative, Motion to Limit Issues for Hearing* (collectively referred to as the "City's Motion").

Through its motion, the City of Rio Rancho ("City") seeks to negate Protestants' ability to mount any challenge whatsoever to the above-referenced application, OSE File No. SD-08707 into RG-6745 *et al*, filed originally on December 29, 2016 and amended on December 27, 2017 ("Application"), on the grounds of impairment, public welfare, or conservation of water.[1] *See* City's Motion at 1. The City seeks such a ruling via three alternate methods: (1) a partial dismissal of the protests through Rule 1-012(B)(6) NMRA; (2) partial summary judgment of the protests

[1] The City and Bosque Del Sol also have applied, via OSE File No. RG-6745 *et al.* into SD-08707-T, to lease back temporarily the Application water to Bosque Del Sol, LLC, but the City's Motion is focused on the original Application.

through Rule 1-056 NMRA; or (3) a vague request "for an order limiting the issues to be properly considered in this matter."[2] *Id.* at 1.

Fundamentally, the City's position is contrary to New Mexico law and to the plain terms of the City's own master permit for OSE file No. RG-6745 through RG-6745-S-34 issued by stipulated judgment in *City of Rio Rancho v. Turney, in the Matter of Application of City of Rio Rancho Hearing No. 97-004*, Case D-1329-CV-2001-00779 (13th Jud. Dist. Aug. 20, 2003) ("2003 Permit").[3] Moreover, the City's Motion does not comply with Rule 1-012(B)(6) NMRA, Rule 1-016 NMRA, or Rule 1-056 NMRA. The City has not shown good cause for its overarching request for a limiting order, which is tantamount to a request to modify the May 1, 2018 *Amended (Corrected) Scheduling Order* ("Scheduling Order") in this matter. In addition, the City's challenge of the protests to the Application does not meet the burdens of proof mandated by Rule 12(B)(6). Furthermore, the City cites and attaches as exhibits in support of its motion documents wholly unrelated to the sufficiency of the protests it challenges so that, at best, the City's Motion must be considered a summary judgment motion. Given the multiple facts in dispute, there is no conceivable way to grant a motion for summary judgment prior to conducting discovery in the case. The City's Motion must be denied because it fails to establish sufficient undisputed issues of material fact to support a summary judgment ruling in its favor. Many of the City's purported undisputed facts are in dispute, others are not material, and the City omits critical facts that demonstrate a denial of the City's Motion is warranted. For any and all of these reasons, the City's

[2] Although the City styles its motion as seeking dismissal or summary judgment, in fact, the City's Motion is seeking partial dismissal or partial summary judgment because the City's Motion does not address some of the Protestants' challenges to the nature and extent to which the move-from water rights qualify as valid pre-1907 water rights eligible for transfer. *See* City's Motion at 3 n.2 (promising a later motion to address move-from validity).

[3] The 2003 Permit indicates that it incorporates all of the water rights for the City, including those based on applications filed in 1979, 1993, and 1997, with the understanding that the certain conditions of approval for those rights approved in 1979 and 1997 were still applicable as indicated in Condition of Approval ¶ 1. *See* 2003 Permit, attached to the City's Motion as Exhibit 4, at 24 and 26.

Motion must be denied.

I. THE CITY'S MOTION MUST BE DENIED BECAUSE IT IS CONTRARY TO THE CITY'S 2003 PERMIT AND RELEVANT GOVERNING LAW.

The City's Motion contains the audacious claim that a protest of the current Application on any basis other than a challenge to the validity of the move-from water rights is not permissible under the terms of the 2003 Permit. *See* City's Motion at 13 ("The Permit provides that as long as the rights to be transferred are valid, existing surface water rights, there will be no impairment, and such acquisition and transfer will not be contrary to the conservation of water or detrimental to the public welfare of the state"). The underlying premise of the City's Motion appears to be that the 2003 Permit decided *all* matters of impairment, public welfare, and conservation of water relating to *any* of the City's water rights transfer applications after 2003 until its 2003 Permit transfer amount limits are reached, so long as those subsequent transfers of water rights are "existing valid surface water rights from anywhere within the MRG." *Id.*; *see also*, *id.* at 17 and 18.

The City appears to be arguing that, for any transfer to fulfill the 2003 Permit offset requirements, all persons who may be affected by a proposed transfer of a water right from anywhere within the Rio Grande basin are foreclosed from challenging that transfer irrespective of whether that transfer impairs a person's water rights or otherwise adversely affects the public welfare or the conservation of water. The City appears to believe that the State Engineer's decision to grant the 2003 Permit is the functional equivalent of a class action which adjudicated impairment, public welfare, and conservation of water for all water users from Cochiti dam to Elephant Butte dam and bound them on those matters for all post-2003 water transfers to be made by the City in accordance with that permit.

All of the City's legal arguments about the protests being impermissible "collateral attacks"

on the already administratively-settled 2003 Permit flow from this underlying premise. *See id*. at 13-19. The premise is fundamentally flawed, however, because it would mean, in effect, that no changed conditions or new information could be a basis for the State Engineer to condition, limit, or deny a proposed transfer of water rights by the City for offset purposes, except where the water rights proposed for transfer are not valid, pre-1907 rights. This argument must be rejected along with the City's "collateral attack" arguments based upon that flawed premise.

The New Mexico Supreme Court long ago recognized that State Engineer determinations in water rights applications occupy a special category of administrative action. In *Cross v. Erickson*, 1963-NMSC-061, 72 N.M. 73, the Court recognized that there are constant improvements to the science of hydrology that allow continual refinements to the analysis of applications for new groundwater appropriations. Refusing to apply the doctrine of *res judicata* to a previous denial of an application for groundwater, the Court stated as follows:

> We recognize that the hydrology of underground waters is not an exact science; new data is constantly being obtained which must be correlated with that which is already known, thereby necessitating the periodic revision of hydrographic formulas and maps. To a considerable degree, the hydrologist must arbitrarily, though scientifically, estimate the present and future quantity of water underlying a particular area. It is a tribute to the profession that a reasonable degree of accuracy is ordinarily achieved.
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> Yet the engineer is required, by law, to make his determination on the facts before him, even though these facts and information may vary from year to year and be subject to periodical revision by reason of technical advances, new surveys, or additional hydrological information. So it is that res judicata in the ordinary sense cannot apply, even though there is identity of parties, issues, and general questions of fact. Nonetheless, the ultimate facts as to the existence of unappropriated water and/or the impairment of existing rights must be determined in each instance.

Id. at ¶ 7. Clearly, the current Application requires a full analysis of the impacts of transferring

the specific water rights delineated in the Application as offsets under the 2003 Permit. This process is mandated by statute and required by the 2003 Permit on its face.

Here, the City seeks to transfer 500 acre-feet, consumptive use, of water rights appurtenant to 238.1 acres of allegedly formerly-irrigated farm land near Socorro, New Mexico to the City's municipal wells. The City has applied for a permit to change the point of diversion and place and purpose of use of a surface water right to groundwater and to lease back the water to the seller until it is needed by the City. NMSA 1978, § 72-5-23 governs the Application. It states in pertinent part:

> All water used in this state for irrigation purposes . . . shall be considered appurtenant to the land upon which it is used, . . . and with the consent of the owner of the land, all or part of the right may be severed from the land, simultaneously transferred and become appurtenant to other land, or may be transferred for other purpose, without losing priority of right theretofore established, if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state . . . .

NMSA 1978, § 72-5-5(B) contains similar provisions:

> Any person, firm or corporation or other entity objecting that the granting of the application will be detrimental to the objector's water right shall have standing to file objections or protests. Any person, firm or corporation or other entity objecting that the granting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protests.

New Mexico regulations mirror these statutory requirements. *See* 19.26.2.11.B NMAC and 19.26.2.12.E NMAC.

Under the City's theory, Protestants should have divined back in 1993, when the City filed its application for an additional 12,000 acre-feet per year (which ultimately resulted in its 2003 Permit), that this current Application for a 500 acre-feet consumptive use water rights transfer

would be filed at some point in the future. Except for any concerns relating to the validity of the move-from water rights, the City contends that Protestants should have raised any concerns about the granting of this Application decades ago. The City's theory not only ignores the express terms of the above-quoted statutes and regulations, which allow for every transfer to be evaluated,[4] but also the express terms of the 2003 Permit requiring the City to obtain permits for future transfers to offset pumping impacts, *see* 2003 Permit, attached to City's Motion as Exhibit 4, at 26,[5] and the notice that the City advertised regarding the Application both in January of 2017 and again in January of 2018. *See* letter from Barbara Lucero to Wayne Canon (Dec. 29, 2016) (discussing original Notice of Publication); letter from Barbara Lucero to Gary Stansifer (Feb. 13, 2018) (transmitting original Affidavits of Publication for filing), attached to the City's Motion as part of Exhibit 6 and as Exhibit 7; and, associated notice, attached to the City's Motion as Exhibit 7 ("Any person, firm or corporation or other entity having standing to file objections or protests shall do so in writing . . . . The objection to the approval of the application must be based on: (1) Impairment; if impairment, you must specifically identify your water rights; and/or (2) Public Welfare/Conservation of Water: if public welfare or conservation of water within the state of New Mexico, you must show how you will be substantially and specifically affected."). It is clear, by the City's published notices on two separate occasions (the second time being a month *after* the City first filed an earlier version of this Motion in December of 2017), that objections and protests to *this* Application and leaseback are in fact permissible and that the City cannot now claim

[4] *Accord,* 19.25.2.7.H.3 NMAC (defining a "protested application hearing" as one "that provides an applicant whose application has been protested and *any protestant* an opportunity to be heard on the merits of the application, including whether it will be detrimental to the objector's water right or otherwise result in impairment to existing water rights, be contrary to the conservation of water within the state, or detrimental to the public welfare of the state")(emphasis added) and *Montgomery v. Lomas Altos, Inc.*, 2007-NMSC-002 ¶ 21, 141 N.M. 21 (question of whether an application will impair existing water rights is one that must be decided upon the facts of each case) citing *Mathers v. Texaco, Inc.*, 1966-NMSC-226, ¶ 16, 77 N.M. 239, 245.

[5] Condition of Approval ¶ 3 in the 2003 Permit expressly requires that the City "file application(s) and obtain permit(s) from the State Engineer" to offset its pumping impacts and thereby imposed the standard statutory review process for those proposed offset transfers, including analyses of impairment, conservation of water, and public welfare.

otherwise.

The fact that the City received a permit in 2003 to pump an additional 12,000 acre-feet per year does not give the City a free pass from any analysis of impairment, public welfare, and conservation of water for all applications after 2003 for transfers of surface water rights to offset those pumping amounts. Under the terms of the 2003 Permit and 19.26.2.12.H.2 NMAC, the State Engineer expressly retains jurisdiction over the Permit to implement its conditions. One condition of approval is the requirement for the City to file applications and obtain permits from the State Engineer authorizing the acquisition and transfer of valid consumptive use surface water rights equal to 12,000 acre-feet, less credit for any approved return flows, but that condition cannot be read in isolation because these transfers may "not be exercised to the detriment of valid existing water rights or in a manner that is contrary to the conservation of water within the state or detrimental to the public welfare of the State of New Mexico." *See* 2003 Permit, Condition of Approval ¶ 1 at 26; *see id*. at 26, Condition of Approval ¶ 3 and at 34, Condition of Approval ¶ 13. The City, through its motion, essentially is requesting that Conditions of Approval ¶¶ 1 and 13 in the 2003 Permit be disregarded.

In addition to being illogical, the City's interpretation of its 2003 Permit is contrary to governing New Mexico statutes and regulations. The Hearing Examiner must therefore reject the City's Motion because the legal ruling the City seeks is built upon an underlying premise that disregards the 2003 Permit in addition to the fundamental statutory and regulatory structure of New Mexico water law.

The City accurately points out that the Application is not subject to the State Engineer's now defunct dedication and retirement practices. *See* City's Motion at 17-18. Those dedication and retirement practices were explicitly part of the City's "1979 Permit," *see id*. at 4, but were not carried forward into the additional 12,000 acre-feet of pumping granted (subject to various

conditions) in the 2003 Permit, *see id*. at 18, because those dedication and retirement practices were found to be illegal by the New Mexico Attorney General Opinion No. 94-07 (Dec. 23, 1994) ("A.G. Opinion 94-07"). In that opinion, the Attorney General found one could not preordain a to-be-retired water right to be exempt from any analysis of impairment, public welfare, and conservation of water without first knowing the location and the nature of the right to be retired. *See* A.G. Opinion 94-07 at 7. A.G. Opinion 94-07 specifically considered and rejected the arguments raised by the City in this proceeding, that is, that any impairment analysis for the offsetting surface water rights would be conducted and concluded when the original application for a new appropriation was under review. The Attorney General roundly dismissed this contention:

> The practice of conditioning new water appropriations on the future retirement of unidentified water rights in order to prevent impairment of existing water rights, however is not lawful. Absent the critical information about the location and specifics of the water rights to be retired, it is impossible for the State Engineer to make a finding that the new appropriation-plus-retirement is not contrary to the conservation of water and will not be detrimental to the public welfare. NMSA 1978, § 72-12-3. Similarly, it is impossible for the State Engineer to find that the new appropriation-plus-retirement will not impair any existing rights because whether there will be impairment depends upon the location and nature of the rights to be retired. Id. Moreover, since the public notice describes only the new permit application and not the surface water rights to be retired, the public is never notified of a key part of the transaction and cannot meaningfully participate in the process. In the absence of adequate public notice, comment, and opportunity to protest, the State Engineer cannot fully evaluate impacts on existing water rights, public welfare, and water conservation.

Id. at 7.

The City is essentially arguing for the return of the days when unidentified surface water rights could be slated for offsets as the State Engineer considered an application for a new groundwater appropriation, but that any affected parties, such as the Protestants here, would have

no standing to object to the effects on them. A.G. Opinion 94-07 concluded that this practice was not only unacceptable and illegal, it would be a violation of the due process rights of those persons who stand to be harmed by the subsequent retirement of surface water rights. At the time of the consideration of the request for a new appropriation, if it receives no notice of the location of the surface water rights that will be used for offsets in the future, the public cannot participate meaningfully in the consideration of the pending application. Indeed, had those issues been raised during the proceedings that resulted in the issuance of the 2003 Permit, the City would have undoubtedly argued that those issues were not "ripe" for review because the water rights to be transferred had not yet been identified.

The City would have been correct in such a "ripeness" argument. It would be contrary to law if the City had been allowed through the 2003 Permit to subsequently transfer any water rights for offset purposes without fully analyzing each transfer in terms of whether it will impair other water uses, be contrary to conservation, or be detrimental to the public welfare. That statutory analysis cannot possibly occur when the application for a new appropriation is filed because there is no identification of the place, location or quantity of use associated with the offsetting surface water rights. Plainly, the State Engineer could not have ruled in allowing a new appropriation through the 2003 Permit that the transfer of any surface water right anywhere within the Middle Rio Grande Valley could never impair the water rights of another or be contrary to the public welfare or violate principles of the conservation of water. Therefore, the City's reading of its 2003 Permit must be rejected.

II. THE CITY'S MOTION MUST BE DENIED BECAUSE PROTESTANTS' OBJECTIONS TO THE APPLICATION DO NOT CONSTITUTE A COLLATERAL ATTACK ON THE 2003 PERMIT.

Protesting the Application on grounds that granting it will be detrimental to existing water rights, contrary to water conservation, and detrimental to the public welfare does not constitute a

collateral attack on the validity of the City's 2003 Permit to appropriate groundwater. The collateral attack doctrine prevents a party from attempting to nullify a prior judgment or administrative proceeding through a separate action "not provided for by law for the express purpose of attacking it." *Phoenix Funding, LLC v. Aurora Loan Servs., LLC*, 2017-NMSC-010, ¶ 32, 390 P.3d 174, 182; *Ctr. for Biological Diversity v. U.S. Envtl. Protection Agency*, 847 F.3d 1075, 1092 (9th Cir. 2017). In the permitting context, courts have recognized that a plaintiff cannot challenge the validity of an existing permit through an action separate from the original permit proceeding. *See Sierra Club v. Virginia Elec. & Power Co.*, 145 F. Supp. 3d 601, 606 (E.D. Va. 2015) ("A citizen suit alleging a violation of a valid permit is a separate and distinct action from one that challenges the very validity of the permit."); *Chem. Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 111 F.3d 1485, 1492 (10th Cir. 1997) (even if resolution of a claim did not rely on revisiting the merits of an underlying permit, the claim could still constitute a collateral attack where the only remedy for the claim was cancellation of the permit). Here, Protestants are not seeking cancellation of the 2003 Permit through their protests of the Application, nor is the validity of the underlying permit an issue. Thus, the collateral attack doctrine does not apply to divest the decision-maker of jurisdiction.

Even though the collateral attack doctrine only applies where the validity of the underlying permit is at issue in the subsequent proceeding, the City erroneously argues that Protestants are "challenging" and "seek[ing] to unravel" the terms and conditions of the 2003 Permit in this proceeding. City's Motion at 16-17. Protestants are simply requiring that the City meet the burden of proof it agreed to when it stipulated to the 2003 Permit issued by the State Engineer. Protestants have not challenged the validity of the 2003 Permit, nor are Protestants seeking relief in this proceeding that would nullify the 2003 Permit. Rather, Protestants assert that the State Engineer should deny or condition approval of the Application (and the accompanying leaseback) *in*

accordance with the 2003 Permit Conditions of Approval ¶¶ 1 and 13.

The City's argument that the instant Application is "inescapably intertwined" with the merits of the 2003 Permit, *see* City's Motion at 16, improperly conflates the two proceedings, and ignores the wholly separate process for transfer applications. A claim is considered a collateral attack where the claim "is 'inescapably intertwined with a review of the procedures and merits surrounding' an underlying agency order." *Ctr. for Biological Diversity*, 847 F.3d at 1092 (citation omitted). This is simply not the case here. The issues are not intertwined at all. The 2003 Permit granted an appropriation of groundwater, but it conditions that appropriation on the requirement that in every case the City first successfully (consistent with the requirements of the transfer statutes) transfers an offset water right into its wells. And, as discussed above, the State Engineer retains continuing jurisdiction over implementation of the 2003 Permit conditions, *see* 2003 Permit, Conditions of Approval ¶¶ 12-13, and the State Engineer's decision on the instant Application must be based on a determination of whether this specific Application will impair existing rights, be contrary to the conservation of water, or be detrimental to public welfare. NMSA 1978, § 72-5-23. No part of this determination requires the State Engineer to re-evaluate the merits of Condition of Approval ¶ 3 in the 2003 Permit requiring the City to obtain surface water rights to offset impacts from groundwater pumping. Because a finding as to the merits of any terms and conditions in the 2003 Permit is not a necessary part of the State Engineer's decision on the transfer Application, the protests are not "inescapably intertwined" with the 2003 Permit. *See Gilbert v. Ben-Asher*, 900 F.2d 1407, 1411 (9th Cir. 1990) (finding tort claim a collateral attack on underlying administrative decision where plaintiff could only prevail by showing underlying decision was improper); *Tur v. Fed. Aviation Admin.*, 104 F. 3d 290, 291 (9th Cir. 1997) (finding due process claim a collateral attack on order revoking pilot's license where claim would result in re-examination of evidence, testimony, and conclusions from revocation proceeding).

Finally, none of the cases the City cites support its argument that the protests are impermissible collateral attacks on the 2003 Permit. Protestants are not attempting to "avoid" or "evade" the 2003 Permit, *see Phoenix Funding, LLC*, 2017-NMSC-010, ¶ 32, but are, instead, seeking to ensure *all* 2003 Permit conditions of approval are factored into the analysis of the Application. And, as discussed above, *Tur* and *Chem. Weapons Working Group* actually support Protestants' arguments that the protests are not collaterally attacking the 2003 Permit. Neither *U.S. v. Backlund*, 689 F.3d 986, 999-1000 (9th Cir. 2012), nor *U.S. v. Lowry*, 512 F.3d 1194, 1195-97 (9th Cir. 2008), are relevant because, in both cases, defendants were facing criminal trespass charges for residing on Forest Service lands, and both proffered defenses that prior Forest Service decisions finding each was not entitled to occupy the land were wrongly decided. In both cases, the court held that the defendants had failed to exhaust administrative remedies when each failed to challenge the validity of the Forest Service's decisions so neither could collaterally attack those decisions in the criminal proceeding. Here, the protests are not based on the merits of whether the 2003 Permit should have been granted. Therefore, there is no basis for the City's argument that Protestants are barred by the doctrine of failure to exhaust administrative remedies from protesting on any ground apart from the validity of the water right. *Grand Canyon Trust v. Public Serv. Co. of N.M.*, 283 F.Supp.2d 1249, 1253-54 (D.N.M. 2003), cited in the City's Motion, also is inapplicable. There, the plaintiff sued PNM for failing to get a Clean Air Act preconstruction permit where the Environmental Protection Agency had already determined that PNM did not need a permit. The court held that the plaintiff could not collaterally attack the federal agency's decision through a suit against PNM. Here, Protestants are protesting an *application* to transfer water for which the State Engineer has yet to make a decision. Unlike the plaintiff in *Grand Canyon Trust*, Protestants are not attempting to collaterally challenge a State Engineer decision by bringing claims against the Applicants and arguing that the 2003 Permit should not have been issued *ab*

initio. Therefore, none of these cases support or are instructive for the City's collateral attack argument.

III. THE CITY'S MOTION MUST BE DENIED BECAUSE IT DOES NOT MEET THE STANDARDS FOR MODIFYING THE SCHEDULING ORDER.

Although the City fails to mention them, there are standards set forth in the Scheduling Order in this matter and in Rule 1-016 NMRA that govern the City's vague alternative request "for an order limiting the issues to be properly considered in this matter." City's Motion at 1; *see id*. at 3 (requesting in the alternative "an order ruling that impairment, pubic welfare, and conservation of water are not in dispute and will not be considered at the hearing on the Application"). The City's Motion does not meet those standards.

The Scheduling Order states that the issues to be heard regarding this Application include "[w]hether granting the application would result in impairment to existing water rights"; "[w]hether granting the application would be detrimental to the public welfare of the state"; and "[w]hether granting the application would be contrary to the conservation within the state." That Order further provides that modifications to it may only occur "upon the consent of the parties and the Hearing Examiner, at the discretion of the Hearing Examiner for good cause shown, or by the Hearing Examiner to prevent manifest injustice." Scheduling Order at 4, § 3 and 8, § 12.[6] Rule 1-016(B)(8) NMRA also clarifies that "[a] scheduling order shall not be modified except by order of the court upon a showing of good cause."[7]

As explained in section I, *supra*, the City has based its various alternate requests for relief on an untenable theory of its 2003 Permit. Therefore, the City has not made any showing of good

[6] The original scheduling order issued on August 14, 2017 in this matter contained identical language.

[7] In the *Notice Regarding Statement of Issues*, submitted for filing by the City on April 11, 2018, the City inserted a footnote purportedly to preserve its arguments stated in the City's Motion, notwithstanding the listing of the issues for determination in this administrative hearing. This footnote does not demonstrate "good cause" or "manifest injustice" for amendment of the Scheduling Order or any consent by the Protestants that the "good cause" or "manifest injustice" requirement has been met.

cause or manifest injustice to warrant amending the Scheduling Order to eliminate the ability for Protestants to be heard on impairment, conservation and public welfare issues.

IV. THE CITY'S MOTION MUST BE DENIED BECAUSE IT DOES NOT MEET THE STANDARDS OF RULE 1-012(B)(6) NMRA.

The City also is invoking Rule 1-012 (B)(6) NMRA to test the sufficiency of the protests to this Application that were filed by the Protestants. City's Motion at 10. But, under Rule 12(B)(6), the protests can only be dismissed "when it appears that [Protestants] can neither recover nor obtain relief under *any* state of facts provable under the claim." *Envtl. Improvement Div. v. Aguayo*, 1983-NMSC-027, ¶ 10, 99 N.M. 497 (emphasis added). In deciding whether a motion to dismiss under Rule 12(B)(6) should be granted, the Hearing Examiner must accept all well-pleaded factual allegations in the protests as being true and resolve all doubts in favor of the protests' sufficiency. *See Runyan v. Jaramillo*, 1977-NMSC-061, ¶ 21, 90 N.M. 629. Under these standards, the City's Motion fails.

A. Protestants' Factual Allegations, Accepted as True as They Must Be for Purposes of a Rule 12(B)(6) Motion, Raise a Sufficient Basis for Claiming the Application Either Impairs Their Water Rights and Uses or is Otherwise Contrary to the Public Welfare or Conservation of Water.

Protestants' factual allegations must be accepted as true for purposes of applying Rule 12(B)(6). *See Runyan v. Jaramillo*, *supra*. Protestants have complied with applicable law in asserting that the Application at issue will cause impairment and be contrary to the public welfare and conservation of water and have sufficiently alleged claims upon which Protestants should be allowed to proceed to hearing. *See* NMSA 1978, § 72-5-5(B) and 19.26.2.12.E NMAC. Protestants assert that the proposed transfer of 500 acre-feet per year of consumptive use water rights in this Application from lands south of Socorro to the City's well fields, when added to the current pumping of the City, could have specific stream-reach effects on the river. These effects could detrimentally impact both the uses of water rights by various Protestants and the obligations

of various Protestants to ensure certain river conditions for the Rio Grande silvery minnow ("silvery minnow"), an endangered species. *See, e.g.*, Protest Letter of Pueblo of Sandia (Feb. 24, 2017) at 2; Protest of Middle Rio Grande Conservancy District (Feb. 9, 2018) at ¶ 6; Protest of WildEarth Guardians (Feb. 12, 2018) at 2. Such allegations, which must be accepted as true for a Rule 12(B)(6) threshold determination, are sufficient to raise claims of impairment and claims that the effects of the transfer of this particular Application are contrary or detrimental to the public welfare and the conservation of water.

With a Rule 12(B)(6) motion, the City bears the burden of establishing that there is no set of facts under which the Protestants could proceed to hearing. *See Rummel v. Edgemont Realty Partners, Ltd.*, 1993-NMCA-085, ¶ 9, 116 N.M. 23. The City has not met this burden. Instead, the City's Motion ignores the fact that stream-reach specific effects resulting from this Application, in conjunction with the City's current pumping levels, could be mitigated through conditions of approval specific to the current Application. The conditioning of the instant Application is certainly within the State Engineer's authority and discretion and, as discussed in Section II *supra*, protests seeking denial of or appropriate conditions on a water rights transfer are not a "collateral attack" on the City's 2003 Permit.[8] *See* 19.26.2.12.F.2 NMAC (State Engineer "may impose reasonable conditions of approval" on a protested application).

The City's Motion also conveniently ignores the fact that there are new requirements on the river that pertain directly to potential effects that the granting of this Application could have which were not even in existence in 1993, when the City applied to expand its pumping and which have changed since the City's permit was issued in 2003. Most notably, section 7 consultation

[8] It appears the City does not dispute the State Engineer's authority to attach conditions of approval to a permit. *See* City's Motion at 11 ("There is no question the State Engineer had authority to require Rio Rancho to offset surface water rights as a condition to the Rio Rancho Permit, and to allow Rio Rancho to divert groundwater subject only to the conditions of the Permit").

under the Endangered Species Act ("ESA") regarding the endangered silvery minnow began in 1998. *See* U.S. Fish and Wildlife Service, *Final Biological and Conference Opinion for Bureau of Reclamation, Bureau of Indian Affairs, and non-Federal Water Management and Maintenance Activities on the Middle Rio Grande, New Mexico* (Dec. 2, 2016) ("2016 BiOp") at 8-9, *available at* https://www.fws.gov/southwest/es/NewMexico/ BO_MRG.cfm (last visited May 10, 2018). The 1998 consultation resulted in a 2003 jeopardy Biological Opinion from the U.S. Fish and Wildlife Service that directed certain water management operations in the Middle Rio Grande to address low flows and river drying, both detrimental to the survival and recovery of the silvery minnow. *Id*. The 2016 BiOp was based on 20 years of observations of the effects of actions on the silvery minnow (and other endangered species), which led to additional requirements to restore river connectivity, provide habitat restoration and enhancement on larger scales, and provide for additional conservation storage of water. *Id*. Also, since the City's 1993 application and the 2003 Permit, there have been several years of abnormal and extreme drought in New Mexico and river drying in the Middle Rio Grande, placing unprecedented demands on surface water supplies in the Middle Rio Grande.

These new 2016 BiOp ESA requirements, along with updated climate change information must be factored into any analysis of the effects that granting of the Application could have on the ability of certain Protestants to meet ESA obligations and underscore why it is appropriate to ensure that specific conditions of approval are included if the Application is granted in whole or in part. Denying or conditioning the current Application is certainly within the scope of actions that can (and Protestants assert should) be taken. Therefore, the City has not met its burden under Rule 12(B)(6) to show there is no set of facts under which the Protestants could proceed to hearing.

B. The City's Motion Incorporates Exhibits That Go Far Beyond Those Acceptable for Review in the Context of a Rule 12(B)(6) Motion and Negate the Ability to Grant Relief Under This Rule.

The City's Motion incorporates a vast array of documents as exhibits that are completely unrelated to the protests the City seeks to dismiss, and therefore, the City's Motion does not conform to the standards of Rule 12(B)(6). *See* Rule 1-012(B) (motion to dismiss for failure to state a claim under Rule 12(B)(6) must be analyzed as a summary judgment motion when matters outside the pleadings are presented). While Protestants agree that Rule 12(B)(6) motions can include consideration of documents that effectively merge into the pleading that is being challenged to be dismissed, *see, e.g.*, *Ruegsegger v. W. N.M. Univ. Bd. of Regents*, 2007-NMCA-030, ¶ 41, 141 N.M. 306, the City has provided no basis for there to be any merger of Exhibits 1, 2, 3, and 5 to the City's Motion, especially when Protestants' factual allegations must be accepted as true.[9]

Protestants, through their protests to this Application, have not challenged the declaration of the basin in 1956 (Exhibit 1 to City's Motion) or even mentioned a now superseded 1956 memorandum regarding administration of the basin (Exhibit 2 to City's Motion) or the application filed by the City in 1979 (Exhibit 3 to City's Motion) referencing a water rights dedication policy that is no longer the policy of the State (which the City admits, *see* City's Motion at 17-18) and is not applicable to the current Application.[10] It also is unclear why the *Middle Rio Grande Administrative Area Guidelines for Review of Water Rights Applications*, prepared by the Office

[9] Protestants acknowledge the 2003 Permit, which is attached to the City's Motion as Exhibit 4, has relevance to the protests, but do not agree that any discussion of impairment, public welfare or conservation of water by Protestants related to the current Application somehow "represent[s] an impermissible collateral attack" on the 2003 Permit. *See* City's Motion at 1; *see id.* at 16.

[10] To the Protestants' knowledge, the 2003 Permit includes in it the water rights amounts for the so-called former "1979 Permit" referenced in the City's Motion in order to arrive at the full not-to-exceed 24,020.16 acre-feet per year in the 2003 Permit. *See* 2003 Permit at 24. Therefore, the Application does not implicate the "1979 Permit" on its own.

of the State Engineer (Sept. 13, 2000)("MRGAA Guidelines")(Exhibit 5 to City's Motion) are relevant to the Rule 12(B)(6) threshold determination of whether Protestants should be allowed to have a hearing on their impairment, public welfare, and conservation concerns about the effects of the current Application, especially since the 2003 Permit specifically states that the MRGAA Guidelines "did *not* form a basis for the evaluation of the Application [for the 2003 Permit] or the development of the [2003] Permit conditions imposed below." *See* 2003 Permit at 11, Finding of Fact ¶ 36 (emphasis added).

None of these documents attached as exhibits to the City's Motion can reasonably be viewed as merging into the protests themselves, and therefore, by attaching such exhibits the City's Motion must be denied under the standards of Rule 12(B)(6).

V. THE CITY'S MOTION MUST BE DENIED BECAUSE IT DOES NOT MEET THE STANDARDS OF RULE 1-056 NMRA.

As with its Rule 12(B)(6) request, the City bears the burden of proof as the movant seeking summary judgment pursuant to Rule 1-056 NMRA. *See, e.g*., *Tapia v. McKenzie*, 1971-NMCA-128, ¶ 6, 83 N.M. 116 (burden of proof on movant for summary judgment). The City has failed to meet this burden because the City cannot demonstrate that there are no genuine issues of material fact and that the City is entitled to judgment as a matter of law. *See* Rule 1-056(C) NMRA; *see also, Tafoya v. Rael*, 2008-NMSC-057, ¶ 11, 145 N.M. 4, 6-7. In sections I and II, *supra*, Protestants have explained why the City's Motion is wrong as a matter of law and must be denied on substantive grounds. Therefore, this discussion focuses on the City's failure to demonstrate there are no genuine issues of material fact.

A. Protestants Dispute the Accuracy and Completeness of the City's Statement of Undisputed Material Facts.

Protestants hereby respond to the City's assertion of undisputed material facts. The numbered paragraphs below correspond to the numbered undisputed material facts in the City's

Motion unless otherwise indicated.

1. Protestants do not dispute that the Rio Grande Underground Basin was declared in 1956 or that the City correctly quoted a passage from a 1956 order declaring the basin. However, Protestants dispute the statements in paragraph 1 on the basis that they are immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. *See Parker v. E.I. DuPont de Nemours & Co*., 1995-NMCA-086, ¶ 9, 121 N.M. 120 (for purposes of determining if summary judgment is warranted, a fact is material if it will affect the outcome of the case). Nothing in the order from 1956 precludes these issues from being heard at a hearing on the Application. In fact, as discussed in section I, *supra*, the Application must be reviewed by the State Engineer to ensure that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13.

2. Protestants do not dispute that the City's predecessor filed an application in 1979 or that the City correctly quoted a passage from that 1979 application. However, Protestants dispute the statements in paragraph 2 on the basis that they are immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. *See Parker v. E.I. DuPont de Nemours & Co*., *supra*. The City has not alleged any facts that demonstrate that the current Application is being made to fulfill the water rights limits permitted in the so-called "1979 Permit" as opposed to the 2003 Permit.

3. Protestants do not dispute that the 1979 application was duly published and that the public had an opportunity to protest, but do dispute the statements in paragraph 3 on the basis that they are immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water and for the reasons stated in paragraph 2, *supra*.

4. Protestants do not dispute that the 1979 Permit was granted or that the City correctly quoted a passage from it. However, Protestants dispute the statements in paragraph 4 on the basis that they are immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water and for the reasons stated in paragraph 2, *supra*.

5. Protestants do not dispute the City's characterization of the 1979 Permit. However, Protestants dispute the statements in paragraph 5 on the basis that they are immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water and for the reasons stated in paragraph 2, *supra*.

6. Protestants do not dispute the statements in paragraph 6.

7. Protestants do not dispute that the City correctly quoted a passage from the application filed in 1993 in paragraph 7.

8. Protestants do not dispute that both the Department of the Interior, through the Bureau of Indian Affairs, and the Pueblo of Sandia filed protests to the application filed in 1993. However, Protestants dispute the statements in paragraph 8 on the basis that they are immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. *See Parker v. E.I. DuPont de Nemours & Co., supra*. The fact that some of the current Protestants were protestants to the 1993 application resulting in the 2003 Permit does not preclude their right to protest the current Application. As discussed in section I, *supra*, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13.

9. Protestants do not dispute the statements in paragraph 9.

10. Protestants do not dispute the City's characterization of the process leading up to the 2003 Permit in paragraph 10. However, Protestants dispute the statements in paragraph 10 on the basis that they are immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. *See Parker v. E.I. DuPont de Nemours & Co., supra*. The fact that the 2003 Permit was not further appealed does not preclude Protestants' ability to protest the current Application. As discussed in section I, *supra*, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13.

11. Protestants do not dispute that the City correctly quoted a finding from the 2003 Permit, but do dispute the statements in paragraph 11 to the extent that the City is arguing that there is a preclusive effect on the ability of the Protestants to present arguments at a hearing regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. As discussed in section I, *supra*, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13.

12. Protestants do not dispute that the City correctly quoted a finding from the 2003 Permit, but do dispute the statements in paragraph 12 to the extent that the City is arguing that there is a preclusive effect on the ability of the Protestants to present arguments at a hearing

regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. As discussed in section I, *supra*, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13.

13. Protestants do not dispute that the City correctly quoted a finding from the 2003 Permit, but do dispute the statements in paragraph 13 to the extent that the City is arguing that there is a preclusive effect on the ability of the Protestants to present arguments at a hearing regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. As discussed in section I, *supra*, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13.

14. Protestants dispute the characterization in paragraph 14 that the drawdown limits in Finding of Fact ¶ 34 in the 2003 Permit "ensured" no impairment or detriment to conservation of water or public welfare. That finding of fact states that that such drawdown limits were "deemed necessary by the State Engineer to ensure" such a result, but did not actually ensure that result. In addition, Finding of Fact ¶ 34 and the immediately preceding findings in the 2003 Permit are concerned with modeled *groundwater* drawdowns expected to be caused by the City's pumping, not with permit-required transfers by the City of surface water rights to offset the effects of the City's pumping on Rio Grande surface flows. Moreover, in the 2003 Permit, the State Engineer explicitly "retain[ed] jurisdiction" for "the purposes of ensuring that the exercise of the permit [including the implementation of all of its conditions of approval] is not detrimental to existing water rights, is not contrary to the conservation of water within the state and is not detrimental to the public welfare." *See* 2003 Permit, Condition of Approval ¶ 13.

15. Protestants do not dispute that the City correctly quoted a finding from the 2003 Permit, but do dispute the statements in paragraph 15 to the extent that the City is arguing that there is a preclusive effect on the ability of the Protestants to present arguments at a hearing regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. As discussed in section I, *supra*, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, §72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13. And, the State Engineer expressly retained jurisdiction over the 2003 Permit for these explicit purposes.

16. Protestants do not dispute that the City correctly quoted a finding from the 2003 Permit, but do dispute the allegations in paragraph 16 to the extent that the City is arguing that there is a preclusive effect on the ability of the Protestants to present arguments at a hearing

regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. As discussed in section I, *supra* and the immediately preceding responses herein to the City's Statement of Undisputed Material Facts, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13.

17. Protestants do not dispute that the City correctly quoted a finding from the 2003 Permit, but do dispute the allegations in paragraph 17 to the extent that the City is arguing that there is a preclusive effect on the ability of the Protestants to present arguments at a hearing regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. Indeed, the finding quoted in paragraph 17 underscores Protestants' arguments that the 2003 Permit was only granted subject to the conditions of approval, and as discussed in section I, *supra*, and above, those conditions, when read together and not in isolation, mandate, in accordance with existing New Mexico law, that the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare.

18. Protestants do not dispute that the City correctly quoted partial information from one of the conditions of approval for the 2003 Permit in paragraph 18.

19. Protestants do not dispute that the City correctly quoted from one of the conditions of approval for the 2003 Permit in paragraph 19.

20. Protestants do not dispute that the City correctly quoted from one of the conditions of approval for the 2003 Permit in paragraph 20.

21. Protestants dispute the City's assertion in paragraph 21 that the 2003 Permit limits the location of the existing surface water rights to be transferred only for the Jemez River. The 2003 Permit expressly provides that the location of water rights that can be transferred "*to offset surface flow depletions to the Rio Grande* and to the Jemez River below the Zia supply Canal point of diversion on the Jemez River may be offset through the transfer of water rights *from the Rio Grande or its tributaries*." *See* 2003 Permit at 28, Conditions of Approval ¶ 3(c) (emphasis added).

22. Protestants do not dispute the statements in paragraph 22. However, Protestants further submit that the statement in paragraph 22 is immaterial to whether Protestants should be allowed to present arguments at a hearing regarding whether the granting of the Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water. *See Parker v. E.I. DuPont de Nemours & Co*., *supra*. The fact that the MRGAA Guidelines were issued in and of itself does not preclude Protestants' ability to protest the current Application. As discussed in section I, *supra*, the Application must be reviewed for purposes of ensuring that it is not detrimental to existing water rights, is not contrary to conservation of water and is not detrimental to the public welfare in accordance with NMSA 1978 § 72-5-23, NMSA 1978, § 72-5-5(B), 19.26.2.11.B NMAC, 19.26.2.12.E NMAC, and the

combined 2003 Permit Conditions of Approval ¶¶ 1, 3, and 13. Moreover, the 2003 Permit states that the MRGAA Guidelines "did *not* form a basis for the evaluation of the Application [for the 2003 Permit] or the development of the [2003] Permit conditions imposed below." *See* 2003 Permit at 11, Finding of Fact ¶ 36 (emphasis added).

23. Protestants do not dispute that the City correctly quotes from the MRGAA Guidelines but, for the same reasons set forth in paragraph 22, *supra*, dispute any contention that the MRGAA Guidelines somehow preclude protests of water rights transfers for offset purposes on the grounds that the transfer is detrimental to existing water rights, contrary to the conservation of water or is detrimental to the public welfare.

24. Protestants dispute any reference to the 1956 order in the statements in paragraph 24 because it is immaterial and for the reasons stated in paragraph 1, *supra*. Protestants do not dispute that the City correctly quoted from the MRGAA Guidelines, but, for the same reasons set forth in paragraphs 22 and 23 *supra*, dispute the statements in paragraph 24 to the extent that the City is arguing that there is a preclusive effect on the ability of the Protestants to present arguments at a hearing regarding whether the granting of the current Application would impair water rights and uses or would otherwise be contrary to the public welfare or the conservation of water.

25. Protestants do not dispute that the City and its co-applicant, Bosque Del Sol, LLC, originally filed the Application on December 29, 2016; Protestants also do not dispute that the notice published by the City regarding the Application states that the City is not seeking additional diversion of water beyond that in the 2003 Permit through the Application and that the notice also states that the Application "is made for the purposes of complying with the Conditions of Approval of [the 2003 Permit] which requires the City of Rio Rancho to offset the impacts of groundwater pumping on surface flows of the Rio Grande and its tributaries." *See* Notice, attached to the City's Motion as part of Exhibit 6. Protestants dispute that the transfer of water rights proposed in the Application will not impair water rights and uses or would otherwise not be contrary to the public welfare or the conservation of water without additional conditions of approval being included if granting the Application in whole or in part. Protestants also do not dispute that the Application was republished, but do dispute that it was done solely to correct "typographical errors." The Application was actually amended by the City and by the seller of the water rights, Bosque Del Sol, through handwritten edits to the original application, which edits were dated December 27, 2017. Those edits substantively change the description of the location of the move-from lands in the Application.

26. Protestants do not dispute the statements in paragraphs 26-33.

B. The City's Motion Does Not Meet the Standards for Summary Judgment Because Its Alleged Material Facts are Either in Dispute or Not Material and the City Omitted Critical Facts That Would Result in Denial of Its Motion.

"If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper." *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331 (internal citation omitted). That is not the case here. As set forth in section V.A., *supra*, many of the City's

alleged undisputed material facts are actually disputed or are not material. Alleged "undisputed facts" must be "material" in order to form a basis for a grant of summary judgment. *See Romero v. Phillip Morris, Inc.*, 2010-NMSC-035, ¶ 11, 148 N.M. 713. To be "material," the fact has to affect the outcome of the case. *See Parker v. E.I. DuPont de Nemours & Co.*, *supra*. Protestants have explained in section V.A why various alleged facts do not affect the outcome here.

Courts do not rule on issues of fact but instead determine whether disputed issues of material fact exist precluding summary judgment. *See Blauwkamp v. Univ. of N.M. Hosp.*, 1992-NMCA-048, ¶ 9, 114 N.M. 228. In doing this analysis, all reasonable inferences must be construed in favor of the non-moving party. *See Portales Nat'l Bank v. Ribble*, 2003-NMCA-93, ¶ 3, 134 N.M. 238. Summary judgment must be denied if a *single* disputed issue of material fact is present. *See, e.g., Fid. Nat'l Bank v. Tommy L. Goff, Inc.*, 1978-NMSC-074, ¶ 6, 92 N.M. 106; *Pharmaseal Labs, Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 90 N.M. 753. Pursuant to these standards, given that Protestants have demonstrated there are multiple disputed issues of material fact, the City's request for summary judgment must be denied.

In addition, as more fully described in section I, *supra*, the City omitted material facts that would result in denial of its motion. *See Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 26, 137 N.M. 64 ("Genuine issues of material fact . . . preclude summary judgment."). The City's Motion conveniently ignores two important conditions of approval in the 2003 Permit, Conditions of Approval ¶¶ 1 and 13, which must be read in conjunction with the Permit's Condition of Approval ¶ 3 in order for the 2003 Permit to comply with New Mexico statutes and regulations. When these three conditions of approval are read together in the context of the State Engineer's statutory and regulatory regime, it is clear that Conditions of Approval ¶¶ 1 and 13 are not only material, but mandate that Protestants be given the opportunity to present their case regarding whether the current Application impairs any of their water rights or otherwise is contrary or

detrimental to the public welfare or conservation of water.

VI. CONCLUSION.

The City's Motion is a house of cards that cannot stand because it is built upon a substantively incorrect legal premise that disregards both explicit conditions of the 2003 Permit's approval and clear statutory provisions. In addition, the City has not met its burdens for any of the alternate procedural avenues it chose to pursue for the relief it sought. Therefore, and for the reasons set forth more fully herein, there is no basis for granting the City's Motion and Protestants respectfully request that it be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all parties entitled to notice via electronic mail on May 11, 2018 as follows:

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