IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.,
OFFICE OF THE STATE ENGINEER,

Plaintiff-Respondent,

v.

No. S-1-SC-37903
Oral Argument Requested

TOBY ROMERO,

Defendant-Petitioner.

PETITIONER'S BRIEF IN CHIEF

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Appellant, Toby Romero ("Romero"), hereby files his Brief-in-Chief in accordance with Rule 12-318 NMRA.

Appellant requests oral argument. Partial forfeiture of an underground water right has never been decided in New Mexico save the Court of Appeals' opinion in this matter. The parties recognize interpretation and application of New Mexico surface water and ground water forfeiture statutes are important public concerns given the scarcity of water in New Mexico. **Resp. to Pet.** pgs 2-3. The public also holds an important and substantial interest in the even-handed application of law with respect to the determination of property rights claimed. **Pet.,** p. 7; *State ex rel Erickson v. Mclean*, 1957-NMSC-012, ¶¶ 19, 28, 62 N.M. 264, 272, 308 p.2d 983 (regulation is not confiscation in the context of waste of water off an artesian well which is not beneficial use and subject to forfeiture). Thus, oral argument would be helpful to address concerns this Court may have before it reaches decision on Romero's Petition for Certiorari.

I. INTRODUCTION

This Court granted certiorari to hear and decide the following issues:

> *As a matter of first impression, whether New Mexico allows partial forfeiture on a railroad* [underground] *water right where no waste was argued or apparent on the record and the plain language of the forfeiture statute is clear.*
>
> *Whether rebuttal of abandonment of the minimum quantification of the railroad water right, clearly found and calculated by the Special Master and appealed to the Court of Appeals to so consider* [but not reached] *should be remanded.*

The Court of Appeals decision affirmed the Special Master and decided partial forfeiture of a ground water right is allowed in the state of New Mexico under NMSA (1978) § 72-12-8(A) (2002) by construing NMSA (1978) § 72-5-28 (A) (2002) (surface water forfeiture) instead and did not reach the issue of rebuttal of abandonment (preserved). **Op.** pgs.10-11. In doing so, the appellate court did not follow established New Mexico cannons of statutory construction under its own cited authority and relies on a non-binding case wrongly decided, *State v. Hagerman Water Right Owners, Inc.,* 130 Idaho 727 P.2d 400 (Idaho 1996), construing an entirely different forfeiture statute under judicial fiat that NMSA (1978) § 72-12-8(A), clear as written, is "ambiguous" and allows for partial forfeiture. **Op.** p.18.

The Opinion also conflates substantive water law with procedures directed under separate New Mexico forfeiture statutes to conclude partial forfeiture is indeed permitted under NMSA (1978) § 72-12-8(A). **Op.** pgs.11-13, 15. Moreover, the Opinion cites inapposite surface water regulation that does not support that the OSE applies partial forfeiture to the ground water forfeiture statute under any reasonable construction. **Op.** p.17 citing 19.26.2.20(A) NMAC. Language from cases cited in the Opinion—redacted to achieve a forced and limited construction of the underground water forfeiture statute—mischaracterizes what in fact was stated or held by New Mexico courts to imply that the Legislature

either condoned the conflation of substantive law with the separate issue of statutory construction by silence or was ignorant of the effect of the separate forfeiture statutes it passed going to ground and surface water. **Op.** p.13. The Court of Appeals is correct that Romero did not appeal the Special Master's quantification of the railroad right because he contends that the Special Master had no discretion to find and conclude pre-statutory forfeiture upon binding law applied to the facts. **Op.** p.7-8. Thus, the Court of Appeals should have reached the issue of rebuttal of presumption of abandonment and remanded with instruction to conclude and order the water right quantified.

The Court of Appeals opinion sets a dangerous precedent that is also not needed to protect the conservancy and beneficial use of public waters as discussed and argued below. NMSA (1978) § 72-12-8(A) should have been narrowly construed as it was in derogation of the water law that existed before and at the time the water code was passed in 1907. Instead, the Court of Appeals impermissibly broadened its scope to affirm confiscation of Romero's vested pre-basin groundwater right by partial forfeiture.

II. SUMMARY OF FACTS AND PROCEEDINGS

A. Background

Quantification of the instant railroad water right is a matter of first impression in New Mexico. The sub-file regards an undisputed ground water right

that was perfected before the lower Rio Grande basin was declared in 1982, and that involved multiple domestic, municipal, industrial, commercial, agricultural, and livestock uses. [**RP 382**] (State admits the Railroad perfected the railroad right before the basin was declared but denies the amount of acre-feet alleged; purpose of use cited detailing Romero's claimed multiple water uses).

In 1994, the former ATSF (hereinafter "Railroad") conveyed an underlying 158.5 acre parcel of land located in the former town of Cutter, New Mexico, Sierra County, that included Well LRG-10140 (hereinafter "well"), and intended to convey any water rights it may have had to Romero for consideration. Designated **Ex. 2** (corrected quitclaim). Claimant's expert, Edward Landreth ("Landreth"), is a registered professional civil engineer in New Mexico, previously worked for the former ATSF railroad as director of asset management, and has more than forty years of experience in railroad valuations, acquisitions, and rail road operations in New Mexico and other locales and participated in selling and negotiating the sale of the underlying parcel to Romero in 1994. Designated **Exs. 46-48**.

In the late 1980's, Landreth as director of ATSF asset management was tasked with selling of property not required at the present time for railroad purposes. Tr. Vol. II (Landreth) 282. As director of ATSF asset management, Landreth had the authority to interpret and sell railroad assets, including railroad water rights. *Id.* In the late 1980's, the railroad downgraded the Cutter line to a

marginal line and began a program to sell off its assets it no longer needed to reserve for future uses. Tr. Vol. II (Landreth) 288:17-23.

Railroad land and physical asset abandonments are only legally operative by authority of the federal agency, Surface Transportation Board ("STB"). Designated **Exs. 45**, p. 5, ¶ 6; **88**; **89**. Had the Railroad intended to abandon the well, the existing improvements, including but not limited to, the well, the gas powered engine, pump, and pump house, would have been removed and the site located in what is now the ghost town, Cutter, New Mexico, would have been leveled to ground at the time of the 1994 conveyance, but was not. Designated Ex. **45**, p. 5; Tr. Vol. I (Landreth) 250:1- 251:4. The Special Master failed to see the Railroad and the well did not become part of the ghost town, but in fact survived it which necessarily implied water use.

On July 7, 1998, Romero filed his declaration of water right with the OSE claiming 394.85-acre feet of water per year. Designated **Ex. 3**. Purpose of use was designated by OSE including Agriculture, Domestic, Multiple Domestic, Municipal, and Commercial. **Ex. 4** (Field check). The quantification of the water right attached to the declaration was determined on the basis of annual gross tonnage of locomotives (4,541,000 tons) during peak year of railroad operations (1944). Designated **Ex. 9**. The declaration, attachments and quantification of the

water right was made on reliance of OSE personnel, Ted Reyes and Landreth in part. **Ex. 3**; Tr. Vol. I (Romero) 153:1-154:25.

By March 2004, Romero made serious attempts to market his water rights with the help of his sister, Alicia Aguilar, a licensed realtor. Designated **Ex.** 14, p. 3, ¶ 5; Tr. Vol. I (Aguilar) 201:1-204:25; *see also* Designated **Ex.** 20 (OSE Memo indicating meetings with Ms. Aguilar and Claimant regarding valuation of declared water rights). The record shows water was distributed from the well and was leased to the City of Las Cruces and used for the Spaceport project. In addition, efforts to sell the water rights under contract were made, but the joinder of Romero in the stream adjudication in 2007 created uncertainty and these transactions were not completed.

After joinder in 2007, the OSE offered Romero judgment of no water right. [**RP 51**]. Romero rejected the offer and the sub-file hearing was held February 5, 6, 2015. On July 13, 2016, the Special Master filed his report and order with the district court recommending no water right other than a stock right and Romero timely filed his objection and motion to set aside the report and order, in part, to the extent that it did not find and quantify a railroad water right. [**RP 411-438**; **441-501**].

B. Former town of Cutter

The town of Cutter developed as a watering stop for steam and later diesel engines at the turn of the twentieth century, boomed briefly as a mining town, and then became a community of ranchers thereafter as the town slowly dwindled away by the mid-1960s. Designated **Ex. 45** (Landreth Report) p. 3, ¶¶ 1, 2; 5, ¶ 4; **Ex. 12**. The former ATSF drilled the well in 1921, which the parties stipulated establishes the date of priority. [**RP 553-556**]. There were no other wells that serviced the town of Cutter other than well no. 6 after the subject well was drilled in 1921. Tr. Vol. I (Landreth) 254:10-14. The well is identified under OSE records/ Romero's declaration as the point of diversion, Location: X= 1,401,560, Y= 747,077 Map: LR0-5 on the New Mexico State Plane Coordinate System, Central Zone, 1983 N.A.D. (Well No.: LRG-10140). **Ex. 3**. After 1921, "the retirement in place" of appurtenances or improvements associated with the well was not an abandonment of the well, but merely a removal of the appurtenances from accounting statements for tax reporting purposes. Vol. II (Landreth) 260:1-261:20; Designated **Ex. 52 (A)** (indicating "AFR" or "Authorized for Retirement"). The record and testimony at sub-file hearing established that the well was used by the town of Cutter for domestic and municipal purposes, in addition to railroad and industrial uses. Designated **Exs. 3** (declaration) , **4** (field check), **9** (main line traffic density in million gross tons), **10** (water facilities map), **10 (a)** (same), **45** (Landreth report), **52, 52 (a), 53** (Cutter New Mexico plat layout

indicating street names and residential plats), **61** (affidavits indicating multiple uses of well), **62** (citation of steam locatives used until 1962 and on short lines into the 1960s), **69** (1961 Cutter phone book residential entry), **71** (1980 Cutter census data showing population), **90** (Waldo Johnson corrected affidavit).

C. Romero's purchase of the well and water rights

At the time of the 1994 purchase, a pump jack, fuel tank, and gearhead all in good condition were still attached to the well. The well is located inside a concrete building ("pump house") that was never leveled to the ground, only the motor was missing, which was all that was required to operate the well. Tr. Vol. I (Romero) 150:1-151:14; 158:1-18. Claimant testified that the well was not capped at time of purchase and that the components of the pump were enclosed within the twenty-two-inch casing of the well. Tr. Vol. I (Romero) 158:1-18.

Claimant's water rights consultant and expert Kim Frasier testified at hearing and had personal knowledge that the pump jack, gear head, fuel tank were all in good condition shortly after the 1994 purchase. Designated **Ex.14**, pgs. 1, 3, ¶ 4; Tr. Vol. I (Frazier) 52:1-25. Ms. Fraiser has over 30 years of experience regarding water rights administrative practices, formerly worked at the OSE, and assisted Claimant in his attempts to prove up his declared water rights. *Id.* To this end, she detailed the on-going use of the well for leases and emergency use through the 2000s that included 2009 records verifying the high capacity pumping

off the well, in addition to photos of the water system repaired and operating for construction lease purposes at that time. *Id.*; Designated **Ex. 44**.

A water service record for the well shows it was drilled to a depth of 579 feet with 150 feet of 22-inch casing pipe installed, which would put the bottom of the well approximately 450 feet below the flow line of the Jornada Draw. Designated **Ex. 45**, p.5, ¶ 4. Diversion from the well is shown by Designated **Exs 10, 10 (A), 52, 52 (A) and 53**. From the well, water was pumped and then traveled by gravity flow through cast iron pipe lines that split into a "T" to deliver water at two 10, 000 gallon steel tanks located hundreds of feet from the well. *Id.* One water storage tank was used for railroad purposes and another was used for domestic/municipal service and evidence of the tank was still apparent at the time of the 1994 purchase. Tr. Vol. I (Romero) 151:15-19; **Ex. 52** (showing platted residential lots next to named streets in Cutter); s*ee also* **Ex. 44** at photos 14, 16 (showing remainder of torched steel tank).

D. Water uses past 1960

In 1966, the former ATSF still maintained a station at Cutter and a siding that held 82 rail cars and a communication booth, and the well was necessary for maintenance of those improvements at that time. Designated **Ex. 50**; Tr. Vol. I 250:1-25. In 1989, the former ATSF still maintained the siding and a tool house for maintenance by way employees. Designated **Ex. 51**. BNSF Cutter station

maps last revised September 25, 2009 still showed a 4,452 feet siding at Cutter, which using the methodology utilized in 1966, equals a siding holding 82 rail cars. **Ex. 53**. Three individuals supplied affidavits that support the former town also received water for domestic uses from a line that traveled off the station layout from a storage tank that was located adjacent to the Cutter station. Designated **Exs. 60, 61, 90**.

At hearing, well driller, Waldo Johnson, testified that he helped his father service the well between 1962 and 1964. Tr. Vol. I 70:21-71:1. At that time a large steel tank stored water, the tank was located southwest of the pump house toward Cutter and water was delivered to the tank by gravity flow. Tr. 79:5-12; 82:1-15; 84:12-25; 263:9-17. Mr. Johnson testified that water from the well was also used for livestock at the time he helped his father service the well between 1962 and 1964. Tr. 70:21-71:1. Mr. Johnson provided hearsay testimony that he recalled some unknown party telling him the well had not run in two or three years when he effected repairs. Tr. 85-86. Mr. Johnson further testified that he understood the reason he was called to repair the well was to provide livestock water to someone in Cutter. Tr. 86. Johnson testified he was familiar with the workings of the well in viewing diagrams and photos at hearing. Tr. 72:18-25. Work on the well took two men and one kid, took days, and the leathers were 6" verses the regular 3". Tr. 75:20-25; 77:23-78:2. All that was required to restore the well to full capacity was

replacing the leathers. When the motor was engaged, the well returned to full capacity. Tr. 76:6-8.

Evidence on the record and testimony of Romero's expert, Landreth, indicated that the railroad leased water from the well to third parties until 1991 that, at a minimum, included leasing water to the New Mexico Department of Transportation in about 1987. **Exs**. 45, p. 4, ¶ 7; 52 (A) at "1-L" as marked by Landreth. Tr. Vol. II 276:16-19 ("152.5 acres including water facilities, Contract 17, apparently 1991"). Because the railroad did not intend to sell its property and water rights until the late 1980's, leased water to third parties off the well into the 1990's, and Romero made serious attempts to market his claimed water rights by 2004, the record showed period of non-use was no more than 10 years on the non-irrigation railroad water right claimed measured from the 1994 purchase to the serious attempts to market the water right in 2004.

E. Amount of Water Attributable to the railroad right

In addition to the numbers used to quantify the minimum water right in his submitted Report, Landreth opined that the peak use of the water right during the steam locomotive era was 394.85-acre feet per year, the amount claimed in the Declaration. **Ex. 3**. Landreth's opinion regarding peak use of the railroad is based on the following analysis: Mr. Landreth supported his assumptions with facts and data from **Ex. 9** (ATSF main line traffic density in millions of gross tons recorded

during the first half of the 20th century), as well as from a BNSF water facilities map, r-o-w and Track Map, and station map. **Exs. 10, 10(A), 52, 52 (A), 53**. Mr. Landreth also relied on his 40 years of professional experience, including civil engineering, to support the factual basis of his assumptions.

Landreth testified domestic and stock use can be extrapolated on the basis of the numbers used in his Report and by reference to ATSF main line traffic density. **Ex 9**. Mr. Landreth's education as a civil engineer and decades of experience with the railroad provided singular expertise in interpreting and determining water capacity off the well, water system, and appurtenances, historically. **Exs. 9, 10, 10(A), 45-48, 52, 52 (A), 53**.

Mr. Landreth's opinion that the railroad used 394.85 acre-feet per year regarded peak capacity during the height of World War II (1944) was not found internally inconsistent with the minimum method of calculating the right utilized in his Report and the Special Master in fact and conclusion calculated the right. [**RP 423**, FOF ¶ 28 (107.53-acre feet); 434, COL ¶ 5 (same)]. Romero argued that the methodology supports Landreth's opinion regarding minimum quantification of the water right. [**RP 447**]; *see also* **Exs. 9, 10, 10(A), 45, 52, 52 (A), 53**. The minimum and maximum quantification of the right is not a mutually exclusive endeavor.

Specifically, a 250 gallon per minute pump could produce no more than 360,000 gallons per day (250 x 60 x 24) or 131,400,000 gallons per year (360,000 x 365), if operated 24 hours a day, 365 days a year. If converted to acre-feet, this means the well produces 403-acre feet per year. Although Romero's claimed 394.85 acre-feet per year provides little allowance for down time, maintenance and repairs, Landreth's Report provides a minimum quantification of the water right on the basis of minimum gallons to service earlier model steam engines. **Ex. 45**, p.3, ¶ 4. If during peak rail use and as Landreth opines, 630 trains passed through Cutter each month, then on average 21 trains passed through Cutter each day (630/30=21). If each train required a minimum of 8,000 gallons of water, it would take 32 minutes to fill one train with a 250 gallon per minute pump. *Id.* Thus, under Mr. Landreth's calculation, the well could fill 21 trains a day if the pump operated 11.2 hours a day.

Romero argued a minimum quantification of the water right of 186 feet per annum is a reasonable baseline of the Railroad's beneficial use of water (8,000 gallons per train x 21 trains per day= 168,000 gallons per day x 30= 5,040,000 gallons per month / 325,851 gallons = 15.47 acre-feet per month x 12= 186 acre-feet per year). **Ex. 45**, p.3, ¶ 4. A reasonable midpoint between the 8,000 gallons of water a steam engine could take on (minimum) as stated in Landreth's Report, and the 17,000 gallons a later era steam engine could take on as used in

quantifying the water right in Romero's declaration can be extrapolated to 276.395 acre-feet per year, which is 70 % of the capacity of the water system and declared 394.85 acre feet water right. Tr. Vol. III 502:19-505:3.

F. The Special Master's Report

The OSE, as Appellee, had no disagreement with the Special Master's Report's findings or legal conclusions, but noted the non-NMSA 1978 § 72-12-1 (2003) nature of the found livestock right in submitted comments on the draft Report. [**RP 379-380**]. The livestock water right found is a pre-basin stock right and neither the OSE nor claimant put on any evidence of the amount of water for the livestock right found at hearing before the Special Master. *Id.*

In denying the railroad water right, the Special Master **a**) focused on the railroad use of the right with respect to an uncertain close of the steam engine era; **b**) did not quantify the livestock right found; **c**) gave no weight to the legal effect of an undeclared basin when applied to the facts [1]; **d**) inconsistently ruled on both forfeiture and abandonment; **e**) found that the OSE met its burden of clear and convincing evidence to show forfeiture and abandonment of the railroad water right, and **f**) did not recognize that the personal testimony of Johnson stating someone told him the well had not worked for 2-3 years whereas Johnson fixed and returned the well to full capacity in between 1962 and 1964 per se does not

[1] There would be no legal reason to keep detailed records to prove a water right before a basin is declared and administered as argued by Romero.

show a consecutive period of 4 years of non user barring pre-statutory forfeiture. [**RP 429** FOF ¶ 51].

In further opposition to the Special Master's Report, Romero relied on Landreth's expert testimony that railroad term of art "Retirement in Place" is irrelevant to the legal doctrines of either abandonment or forfeiture and the beneficial use of the right included other multiple beneficial uses such as municipal. *See* **Exs**. 4, 10, 10 (a), 45, 52, 52 (a), 53, 60, 61. At hearing before the Special Master, Landreth testified that later steam engine trains took on an estimated 17,000 gallons of water during peak use which allowed for slop, waste, domestic and demand for cattle. Tr. Vol. II 273. The scope of the livestock water also included municipal use. *Id.*

The OSE responded that Romero's eleven requested findings of fact to infer water use past the 1960s on the basis of interpreting railroad station maps and other railroad documents, use of water for diesel engines in the 1970s forward, testimony that the railroad continued to use the line, and knowledge that at least 2 steam engines were kept by the railroad in Albuquerque in the 1970s during high water periods on rail did not constitute evidence of water use off the well. [**RP 363-370**]. The OSE also argued that since Romero bought the underlying parcel in 1994, the identification of Cutter as a station as late as 2009 with a siding capable of holding

82 cars somehow conclusively rebutted the notion that water use could be inferred from railroad maps and documents prior to Romero's purchase. *Id.*

On July 13, 2016, the Special Master rejected all of Romero's objections and requested amended findings and filed his Report with the district court recommending Romero had no other right than a stock watering right. [**RP 381-438**].

G. Appeal to the district court

On July 22, 2016 and pursuant to Rule 1-053 E (2) NMRA Romero took appeal before the honorable Judge Wechsler contending the legal errors in the Report were compounded by construing burdens in Romero's favor against him. Further, Romero argued case law regarding partial abandonment is distinguished on the following basis.

Regarding quantification of the Railroad water right, Romero alleged that the Special Master misapprehended that burdens in this case were on Romero **a)** to prove his water right by a preponderance of the evidence and **b)** to persuade the Court. *Id.* Romero argued where the State claims abandonment and forfeiture, the burden is on the State to prove that the doctrines apply, which if found, would then shift the burden to Romero to come forward with sufficient evidence to rebut the presumption of abandonment and cited *State ex rel. Reynolds v. S. Springs Co.*, 1969-NMSC-023, 80 N.M. 144, 149, 452 P.2d 478, 483 *quoting Commonwealth*

Irr. Co. v Rio Grande Canal Water Users' Ass'n. 96 Colo. 478, 45 P.2d 622, 623 (1935). [**RP 441-501**].

Romero argued because clear and convincing evidence is the highest evidentiary standard in civil matters, the State could not meet that burden to show that he acquired either a forfeited or abandoned water right from the Railroad due to evidence on the record, *inter alia*, that the Railroad itself did not have a subjective and objective belief that it intended to abandon or had forfeited its water rights off the well as late as the mid-1980s. *Id.* Romero argued if the abandonment presumption applies, the burden of going forward with the evidence shifts to Romero, but does not shift the burden of persuasion, which at all times remained on the OSE and cited Rule 11-301 NMRA in support of that proposition. *Id.*

Romero argued as the scope of the railroad right included municipal use for the town of Cutter, the appropriation of water for future use, specifically "peak use" by the Railroad in 1944, is a reasonable method to quantify the maximum railroad water right. *Id.* The State never challenged this methodology. Rather, the State argued Romero's proof of the amount of water the Railroad used in 1944 was insufficient. *Id.*

Regarding forfeiture, Romero argued the Special Master misplaced reliance on *Delta Canal Co. v. Frank Vincent Family Ranch*, 2013 UT 69 in finding and

concluding partial forfeiture of almost all of the railroad water right in this sub-file (excluding livestock watering). [**RP 449-450**]. Romero argued the issue of partial forfeiture has never been decided by New Mexico courts, but that it is decided that forfeiture of a water right is disfavored under New Mexico law and in support of that proposition cited *State ex re Reynolds v. Mears*, 1974-NMSC- 070, ¶¶ 11-14, 86 N.M. 510, 525 P.2d 870 (forfeiture of a water right is disfavored under the law, in general, except, in the case of waste or neglect). *Id.*

Romero argued the clear language of the forfeiture statute (NMSA 1978 § 72-12-8 (A)) required that it be construed as non-divisible such that partial forfeiture of a water right cannot be legally upheld. [**RP 450**]. Romero argued the Special Master broadened the scope of the statute, which makes sense as written, to achieve a limited and inconsistent result—both forfeiture and abandonment of the railroad water right, allegedly, from 1960 forward, yet finding a livestock right which is embedded within the railroad water right. *Id.*; [**RP 411-438**, FOF, ¶ 38; COL, ¶ 7]; **Ex.** 4.

Romero argued substantial objective evidence is on the record that shows the railroad did not intend to abandon its water rights and relied on evidence that **a**) maintenance crews continued a presence in Cutter, **b**) the railroad maintained a siding that accommodated the short line, a communication booth, and tool house in Cutter past 1960 into the 1980s and **c**) evidence that shows the railroad leased

water to NMDOT in about 1987 and to other parties until 1991. [**RP 502-503**]. Romero argued this was enough to show objective manifestation that the railroad continued to beneficially use its water right. *Id.* Further, Romero argued that the Special Master ignored other evidence that showed the station layout in Cutter that also detailed the water system off the well that provided water for domestic use to Cutter. *Id.*

The OSE responded that Romero did not address the correct standard (substantial evidence). [**RP 507-510**]. The OSE argued substantial evidence supported the Special's Master's report relying on 1) railroad assets being retired in place before the Romero purchase to show abandonment, 2) that Mr. Waldo Johnson's testimony was sufficient to find forfeiture, 3) that the length of time was a long period of non-use triggering the presumption of abandonment that Romero allegedly did not overcome, and 4) that the quantified and claimed right of 276.395 acre-feet per annum was an "impossible" figure. *Id.*

In Reply, among other arguments, Romero noted that the Special Master found 107.53-acre feet per annum was beneficially used by the Railroad but found partial forfeiture of the right other than a livestock right not argued by the parties on the record. [**RP 513**; 411-438 at FOF COL, ¶ 38; *see also id.*, ¶ 39 ("[T]here is no evidence concerning how much water was used for livestock.")

H. The district court's Opinion and Order

The district court upheld the Special Master's Report in its entirety. The district court held in part that "pro rata" forfeiture applied to New Mexico citing State *ex rel. Reynolds v. Mears*, 1974-NMSC-070, ¶ 7, 86 N.M. 510 and *State ex rel. Erickson v. Mclean*, 1957-NMSC-012, ¶ 20, 62 N.M. 264. [**RP 542**]. As discussed above, Romero appealed to the Court of Appeals which affirmed the Special Master and specifically found partial forfeiture under NMSA (1978) § 72-12-8(A). Romero timely filed his Petition to this Court, which was granted.

III. LEGAL ARGUMENT AND AUTHORITIES

Standard of Review

The issue of statutory construction is subject to *de novo* review. *Jones v. Holiday Inn Express*, 2014-NMCA-082, ¶ 10, 331 P.3d 992; *Stennis v. City of Santa Fe,* 2008-NMSC-008, ¶ 12, 143 N.M. 320, 176 P.3d 309; *Hall v. Carlsbad Supermarket/IGA*, 2008-NMCA-026, ¶ 7, 143 N.M. 479, 177 P.3d 530. The rules of statutory interpretation are applied when interpreting regulations. *Alliance Health of Santa Teresa, Inc. v. Nat'l Presto Indus., Inc.*, 2007-NMCA-157, ¶ 18, 143 N.M. 133, 173 P.3d 55. Application of the law to the facts is subject to *de novo* review. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 6, 129 N.M. 698, 12 P.3d 960.

"If an agency decision is based upon the interpretation of a particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise. However, the court may always

substitute its interpretation of the law for that of the agency's because it is the function of the courts to interpret the law." *Fitzhugh v. New Mexico DOL, Emp't Sec Div.*, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555. "[This Court is] not bound by an agency's interpretation of a statute, since it is a matter of law that is reviewed de novo." *Bass v. Enterprises, et al. v. Mosaic Potash, et al.*, 2010-NMCA-065, ¶ 11, 148 N.M. 516, 238 P.3d 885 *citing N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n,* 2007-NMCA-010, ¶11, 141 N.M. 41, 150 P.3d 991. "On appeal [this Court] may correct an administrative agency's misapplication of the law." *Rio Grande Chapter of the Sierra Club,* 2003-NMSC-005, ¶13, 133 N.M. 97, 61 P.3d 806 (internal citations omitted). With respect to this sub-fie appeal, the Court gives no deference to the district court's findings but instead considers whether the Special Master's findings were supported by substantial evidence. *State ex rel. State Engineer v. Elephant Butte Irr. Dist.*, 2013-NMCA-023, ¶ 18, 296 P.3d 1217.

A. As forfeiture is disfavored, all intendments against forfeiture should have been applied by the Court of Appeals reversing the Special Master.

"Because the State Engineer claimed forfeiture of the water rights, it bore the burden of proof as to this issue." *State ex rel. Martinez v. McDermett*, 1995-NMCA-60, ¶ 16, 120 N.M. 327, 901 P.2d 745. The OSE was required to meet this burden by clear and convincing evidence. *In re Sedillo,* 1972-NMSC-050, ¶ 13, 84 N.M. 10, 498 P.2d 1353 ("For evidence to be clear and convincing, it must

instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true."). In order to establish a forfeiture, the OSE was required to prove that Defendants or their predecessors in title failed to apply the water to the use for which the right vested for a period of four years prior to June 1, 1965. ***Id***; NMSA 1978, § 72-12-8(A).

In the underlying sub-file and during the entire course of this appeal, the lower courts have failed to recognize that Waldo Johnson's personal knowledge of repairing the well to full capacity between 1962-64 defeats any four year period of non-user such that pre-statutory forfeiture could have been triggered. The hearsay statement of some other individual that the well had not operated for "two or three years" goes to this conclusion that a four-year period of non-user could not be met—not that Romero challenged the hearsay statement as inadmissible. **Op**. p. 5. The Special Master took the hearsay statement of Waldo Johnson finding a "significant fact" that the railroad "ceased all significant operations" <u>also in two to three years</u> to conclude that 1960 was the last year of regular steam locomotive service and then preserved only a livestock watering right on the basis of partial forfeiture decided in Utah. [**RP** 424-425, ¶¶ 37, 38] [**RP** 445 COL ¶ 6 <u>citing</u> *Delta Canal Co. v. Frank Vincent Family Ranch*, 2013 UT 69].

All presumptions against partial forfeiture, however, should have applied because **a**) NMSA 1978 § 72-12-8 (A) does not contain language allowing partial forfeiture; **b**) there was never any argument or evidence of waste or non-use of water by the railroad before 1960; **c**) the undisputed pre-basin vested right enjoyed a right to change the use of water to livestock embedded within the unique railroad right as an incident of ownership without penalty of partial forfeiture, and **d**) the other FOFs challenged for lack of substantial evidence under the OSE's high burden to prove forfeiture by clear and convincing evidence could not instantly tilt the scales in the affirmative when weighed against the evidence in opposition. *Gilbert v. Smith*, 97 Idaho 735, 740, 552 P.2d 1220, 1225 (1976) ("Forfeiture of water rights is not favored and all intendments are indulged in against a forfeiture."); *State ex rel. Reynolds v. S. Springs Co.*, 1969-NMSC-023, 80 N.M. 144, 147, 452 P.2d 478, 481 ("Forfeiture is a punishment annexed by law to some illegal act or negligence whereby the appropriator loses his interest.") (citation omitted); *see also State ex rel. Erickson v. Mclean*, 1957-NMSC-012, ¶¶ 24-27, 62 N.M. 264, 308 P.2d 983 (appropriator not entitled to receive more water than his actual use and method of irrigation through waste which does not constitute beneficial use and is subject to pre-statutory forfeiture); *Clodfelter v. Reynolds*, 1961-NMSC-003, ¶¶ 15,16, 68 N.M. 61, 358 P.2d 626 (general statutes regarding approval by OSE as to change of use is inherent in a vested pre-basin water right as

an incident of ownership and the 1907 Water Act was not a grant of any right but a codification of existing law); NMSA 1978 § 72-12-4 (1953) ("Existing water rights upon application for beneficial use to the OSE are recognized and nothing under the ground water statute is intended to impair existing rights or disturb priorities thereof").

Before the Court of Appeals, the following FOFs were expressly challenged for lack of substantial evidence that the Railroad forfeited all but a livestock water right before 1965 [**RP 411-438** at FOF ¶ 36 (well not in operation for 4 or more years and not used when repaired for any purpose other than livestock watering); ¶ 38 (no purpose of use other than livestock watering by 1960), ¶¶ 40(a) (no evidence steam engines retained past 1960 would use well), (b) (no evidence in record diesel engines if leaking would stop in Cutter for water); (c) (well not capable of producing water until 2009), ¶ 43 (no weight to Landreth opinion), ¶ 44 (no evidence water used from well for any other purpose than livestock watering from 1960 until 1994 purchase).

Finally, the fact that the Special Master quantified the railroad right applied to beneficial use at 107.53 acre feet per annum [**RP 422** FOF ¶ 29, **434** COL ¶ 5] verses Romero's initial declaration of 394.85 acre feet per annum [**Ex. 3**] shows administrative and judicial checks as to the *measure* of beneficial use do not require application of partial forfeiture to a pre-basin vested water right. N.M.

Const. Art XVI, Sec. 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").

B. The ground water forfeiture statute makes sense as written, is non-divisible on its face and is to be narrowly construed as a matter of law.

The Court of Appeals found that "read in isolation" § 7-12-8 (A) was ambiguous and construed § 72-5-28 (A) instead to hold partial forfeiture was intended under the ground water forfeiture statute. NMSA 1978 § 72-12-8 (A) (2002) provides,

> When for a period of four years the owner of a water right in any of the waters described in Sections 72-12-1 through 72-12-28 NMSA 1978 or the holder of a permit from the state engineer to appropriate any such waters has failed to apply them to the use for which the permit was granted or the right has vested, was appropriated or has been adjudicated, the water rights shall be, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, forfeited and the water so unused shall revert to the public and be subject to further appropriation; provided that the condition of notice and declaration of nonuser shall not apply to water that has reverted to the public by operation of law prior to June 1, 1965. *Id.*

By contrast, NMSA 1978 § 72-5-28 (A) (2002) provides,

> When the party entitled to the use of water fails to beneficially use all ***or any part of the water*** claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, ***such unused water shall***, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, ***revert to the public*** and shall be regarded as unappropriated public water; provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner

> have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner; and provided that periods of nonuse when irrigated farm lands are placed under the acreage reserve program or conservation reserve program provided by the federal Food Security Act of 1985, P.L. 99-198, shall not be computed as part of the four-year forfeiture period; and provided, further, that the condition of notice and declaration of nonuser shall not apply to water that has reverted to the public by operation of law prior to June 1, 1965. *Id.* (emphasis added) (emphasized added also by Court of Appeals that partial forfeiture of a surface water right under § 72-5-28 (A) is dispositive of partial forfeiture of a ground water right); **Op**. p. 11.

The Court of Appeals cited statutory construction authority binding on New Mexico courts, but then proceeded to ignore its effect that when a statute is clear there is no further resort to principles of statutory construction requiring this Court to give effect to the statutory language as written. **Op**. p. 9 citing *Badilla v. Wal-Mart Stores East, Inc.*, 2015-NMSC-029, ¶ 12, 357 P.3d 936; **Op**. p. 17 citing State *ex rel. Stratton v. Roswell Indep. Sch.*, 1991-NMCA-013, ¶ 10, 111 N.M. 495, 806 P.2d 1085 ("when he words of the statute are free from ambiguity and doubt, resort should not be undertaken to any other means of interpretation.") (citation omitted). Section 72-12-8 (A) should have been construed by its clear language rather than implying additional language not in the statute to determine a forced result. If the Court of Appeals and the OSE did not like that conclusion, then the Appellate Court should have directed the OSE to go to the Legislature to amend § 7-12-8 (A). Giving effect to § 7-12-8 (A) does not lead to an absurd result and adding language in the statute impermissibly implies that the Legislature was

ignorant of its actions when it passed § 7-12-8 (A). *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the Court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

"The [C]ourt will not read into a statute...language which is not there, particularly if it makes sense as written." *Burroughs v. Brd. of County Comm'rs*, 1975-NMSC-051, ¶ 14, 88 N.M. 303, 306, 540 P.2d 233 (citation omitted); *see also* NMSA 1978 § 12-2A-2 (1997) ("Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage..."). Employing the common usage of section 72-12-8 (A) where for a period of 4 consecutive years of non-use, the owner of a water right in **any** of the ground waters described in the groundwater statutes forfeits the **water rights** and the water so unused reverts to the public. Section 72-12-8 (A) does not say "all or any part of the water" or "such unused water" shall revert to the public. The ground water forfeiture statute plainly directs that any ground water rights are lost, and the quantum of water reverts to the public. Section 72-12-8 (A) is non-divisible. Rules of statutory construction require the harmonization within other provisions of § 72-12-8 that had no bearing on the issue of partial forfeiture before his Court. § 72-12-8 (B-I); *Methola v. County of*

Eddy, 1980-NMSC-145, ¶ 22, 95 N.M. 329, 333, 622 P.2d 234 (when several sections of a statute are involved, they must be read together so that all part are given effect). The Court of Appeals instead impermissibly harmonized groundwater forfeiture on grounds of purported ambiguity with surface water forfeiture and read the surface water forfeiture language into the groundwater statute.

The conflation of case law (as one body of water law) with separate and different statutory administrative procedures regarding forfeiture is unavailing to hold partial forfeiture of a groundwater right heretofore never decided is recognized in New Mexico. The State Engineer is an administrative officer whose office is created by statute. NMSA 1978 § 72-2-1 (1982). The OSE authority is thereby "limited to the power and authority that is expressly granted and necessarily implied by statute." *In re Application of PNM Elec. Servs.*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147; *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 28, 143 N.M. 142, 173 P.3d citing *City of Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 437, 379 P.2d 73, 79 (substantive rights to both surface and ground water are the same when obtained "**but the legislature has provided somewhat different administrative procedure [sic] whereby appropriators' rights may be secured from the two sources**") (emphasis added).

City of Albuquerque did not address the issue of ground water forfeiture but recognized different administrative procedures going to securing a ground water right. In further conflation of case law not addressing partial forfeiture of a groundwater right, the Court of Appeals unremarkably cites *State ex rel. Reynolds v. S. Springs Co.*, 1969-NMSC-023, ¶ 9, 80 N.M. 144, 452 P.2d 478 for the proposition that *the "right to the unused portion"* of a surface water right is forfeited under the surface water forfeiture statute. **Op**. p. 12 (emphasis in original). This Court in *S. Springs Co.* construed the plain language of § 72-5-28 (A) not the plain language of § 72-12-8 (A).

Neither *Yeo v. Tweedy*, 1929-NMSC-033, ¶¶ 39-40, 34 N.M. 611, 286 P. 970 nor *El Paso & R.I.R. Co. v. District Court of Fifth Jud. Dist.*, 1931-NMSC-055, ¶ 29, 36 N.M. 94, 8 P.2d 1064 as cited and redacted by the Court of Appeals respectively stand for the proposition that the Legislature intended former section 5701 of the irrigation code to apply to forfeiture of underground waters. **Op**. p. 13. In *Yeo v. Tweedy* this Court also discussed without deciding "a provision that the use of subterranean waters shall be subject to the same rules and regulations [as surface water] **is different."** 1929-NMSC-033, ¶ 38, 34 N.M. 611 (emphasis added). "[B]y such a provision **positive and substantial rights would be created and perhaps taken away**." *Id.* (emphasis added). Former section 2 going to artesian waters "cannot be ignored." 1929-NMSC-033, ¶ 39, 34 N.M. 611. "It

would seem that as to artesian waters one must obtain a permit to appropriate under the irrigation code and a permit to construct a well under the artesian well code, and that the matter of ["]abandonment["] would be governed by the irrigation code **and the matter of waste by the artesian well code.**" *Id.* (emphasis added). *Yeo v. Tweedy* is no authority for the proposition that the Legislature intended the surface water forfeiture statute to apply to subterranean waters.

Examining the text the Court of Appeals left out in *El Paso & R.I.R. Co.*, 1931-NMSC-055, ¶ 29, 36 N.M. 94 reveals "[t]he Legislature did no doubt consider, as this court had previously indicated, that statutes, in addition to the Water Code, would be necessary to subject artesian water appropriators to the jurisdiction of the state engineer. **It did indicate, as is probably true, that the same regulations cannot well be made applicable to both classes of appropriators.**" *Id.* (emphasis added). *El Paso & R.I.R. Co* is no authority for the proposition that the Legislature intended the surface water forfeiture statute to apply to subterranean waters.

As the record is devoid of any finding of waste on the part of the railroad, the Special Master erred in finding partial pre-statutory forfeiture. Reliance on *Delta Canal Co. v. Frank Vincent Family Ranch*, 2013 UT 69 to hold otherwise is not binding and inconsistent with *State ex rel. Erickson v. Mclean*, the non-divisible nature of the groundwater forfeiture statute as written, and inconsistent

with the Court of Appeals' own cited authority that does not imply partial forfeiture of a ground water right. *State ex rel. Erickson v. Mclean*, 1957-NMSC-012, ¶¶ 19, 28, 62 N.M. 264, 272, 308 p.2d 983 (regulation is not confiscation in the context of waste of water off an artesian well which is not beneficial use and subject to forfeiture); *State ex rel. Reynolds v. S. Springs Co.*, 1969-NMSC-023, ¶ 9, 80 N.M. 144, 147, 452 P.2d 478, 481 citing 2 Kinney on irrigation and Water Rights, 2d Ed., 2020-2021 (1912) ("Forfeiture is a punishment annexed by law to some illegal act or negligence whereby the appropriator loses all his interests therein."); *see also e.g. State ex rel. Stratton v. Roswell Indep. Sch.*, 1991-NMCA-013, ¶¶ 9-10, 111 N.M. 495, 806 P.2d 1085 (legislative intent is primarily derived from the language used in the statute itself, and if there is any doubt as to the meaning of penal statutes or rules, they are strictly construed against the state or agency that enacted it) (citation omitted).

There is no purpose to punish the railroad and successor-in-title Romero under the Special Master's findings of facts taken as a whole. The fact that the Special Master quantified the railroad right applied to beneficial use at 107.53 acre feet per annum—merely 27 % of Romero's claimed water right shows administrative and judicial checks as to the measure and limit of the pre-basin water right and does not support a necessary implication that partial forfeiture is permitted or needed under the groundwater forfeiture statute. N.M. Const. Art

XVI, Sec. 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").

NMAC 19.26.2.20(A) does not support "a long-standing interpretation" that partial forfeiture also applies to § 72-12-8 on any reasonable review of the provision, taken as a whole, and the OSE presumably can show no pre-statutory partial forfeiture of groundwater in any New Mexico case law. **Op.** p. 17. NMAC 19.26.20 (A) on its face details "CHAPTER 26 **SURFACE WATER** PART 2 ADMINISTRATION." *Id* (emphasis added) (amended 2005). NMAC 19.26.20 simply states "A water right may be lost for nonuse in two ways. First, the right may be forfeited pursuant to Section 72-5-28 NMSA **or** Section 72-12-8 NMSA..." *Id.* (emphasis added). The provision then goes on to state that a water right can be lost by the judicial doctrine of abandonment. *Id.* The regulation does not state in any way that the regulations going to administration of surface water subsume the groundwater forfeiture statute or the regulations going to administration of ground water (19.27.2-3 NMAC) (reserved). Subsection A is merely and unremarkably declarative of the particular surface water forfeiture statute provisions. *Compare* 72-5-28 (B) thru (H) *with* NMAC 19.26.20 (A) (1) thru (6).

In cases where there is a conflict between a statute and a regulation, "the language of the statutes shall prevail." *Jones v. Emp't Servs. Div. of Human Servs.*

Dep't, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 619 P.2d 542; *see also State v. Bowden*, 2010-NMCA-070, ¶10, 148 N.M. 850, 242 P.3d 417 (a statute and a regulation that address **the same issue** are in conflict if following one would reach a different result than following the other) (emphasis added); *Picket Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 10, 140 N.M. 49, 139 P.3d 209 (same). In this matter the Court of Appeals does not even show a conflict between the ground water forfeiture statute and the surface water administration regulations. If it attempted to, the Court of Appeals clearly overreached to achieve a forced and limited construction that the ground water statute permits partial forfeiture by surface water administration regulation cited. The OSE cannot show and is not entitled to "administrative gloss."

In reviewing the Court of Appeal Opinion, it is clear that it designed the limiting outcome developed throughout the Opinion upon *State v. Hagerman Water Right Owners, Inc.,* 130 Idaho 727 P.2d 400 (Idaho 1996). Our Court of Appeals should not have found *Hagerman* persuasive for the following reasons. Although *Hagerman* also dealt with the question before this Court as to whether partial forfeiture of a groundwater right was allowed under Idaho's groundwater forfeiture statute, the *Hagerman* court construed a totally different statute than New Mexico' statute, to wit,

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to

> beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation... *Id.* at P.2d 406.

Our Court of Appeals should not compare apples to oranges.

Compounding error, the Idaho Supreme Court found, as it must, that its statute construed "did not explicitly provide for partial forfeiture" but arguably by judicial fiat ignored canons of statutory construction and declared the statute construed as "ambiguous." *Id.* at P.2d 405, 406. The Idaho court went on to rule partial forfeiture was allowed under its ground water forfeiture statute because "all" as an adjective modified "rights" rather than the more distant word "water" [*Id.* at P.2d 406] whereas "any of the waters" are lost where a consecutive 4 year period triggers ground water forfeiture in New Mexico and the water "rights" shall be forfeited if not cured within one year after notice (post June 1, 1965). NMSA 1978 § 72-12-8 (A). By the Idaho Court's own reasoning, it would have found partial forfeiture of a ground water right is not permissible in New Mexico.

Further, the concern enunciated by the New Mexico Court of Appeals as stated in *Hagerman* that once the element of the water right is decreed, an appropriator could hold onto the water by using only a portion against all subsequent appropriators does not address surface water appropriators already subject to partial forfeiture and does not address the limited class of appropriators

similarly situated in this Petition—appropriators under a vested pre-basin ground water right. **Op. p.** 18.

Finally, the Court of Appeals misapprehends the arguments made as to pre-basin vested water rights before the jurisdiction of the OSE attached. **Op.** 22. Precisely, there are no cases on point regarding pre-statutory partial forfeiture of a ground water right. The OSE cannot point to any because they do not exist. The point Romero was making during the entire proceedings below is that before statutory forfeiture and the declaration of a basin vesting jurisdiction in the OSE, there was no need to keep records and document the water right to secure water rights from being confiscated administratively.

IV. CONCLUSION

WHEREFORE, this Court should reverse the Court of Appeals decision; find and conclude that partial forfeiture is not permitted or implied under the groundwater forfeiture statute, and otherwise set aside the Special Master's Report with express instruction to either remand for quantification of the railroad right or alternatively reach the issue of rebuttal of the presumption of abandonment.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was e-mailed to opposing counsel of record and that an original was e-filed in the New Mexico Supreme Court on the 5th day of February 2020.

/s/ Reed C. Easterwood
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