IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
April 24, 2020

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,

and

ELEPHANT BUTTE IRRIGATION DISTRICT, et al.,

Defendants.

RESPONDENT STATE OF NEW MEXICO'S ANSWER BRIEF

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STATEMENT OF COMPLIANCE WITH RULES 12-318(F) AND 12-318(G) NMRA

Undersigned counsel for Plaintiff-Respondent State of New Mexico hereby certifies that the text and footnotes for this Answer Brief are typed in Times New Roman 14 point font. Undersigned counsel also certifies that the word count for the number of words in the body of the Answer Brief, including text and footnotes, consists of 7,930 words. The Answer Brief therefore complies with Rules 12-318(F) and 12-318(G) NMRA.

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I. Introduction

This is an appeal from a single subfile order entered in the Lower Rio Grande stream system adjudication suit. The claimed groundwater right at issue, consisting of almost 400-acre feet of water per year ("afy"), was initially developed by a railroad company in 1921 to supply water for the railroad's steam engines. The town of Cutter, New Mexico was established around the railroad stop. By the 1950s, the railroad ceased using steam engines and switched to diesel engines. There was no more need to supply water for steam engine boilers and the vast majority of the water use under the railroad's groundwater right stopped. Only a small amount of water continued to be used to water livestock. The town of Cutter was abandoned.

Decades later, a predecessor in interest to the Petitioner bought the property comprising the now-ghost town of Cutter from the railroad in 1994. Twenty years after that, as the Lower Rio Grande water rights adjudication suit was addressing the claimed groundwater right, Petitioner obtained a quitclaim deed from the railroad for any and all water rights associated with the property. In the course of the adjudication proceedings, Petitioner rejected the State's offer of "no right" due to forfeiture for non-use. The special master, the adjudication court, and then the Court of Appeals all concluded that the vast majority of the water right, except for

the small portion used to water livestock, had been forfeited for non-use prior to 1965.

Petitioner now asks this Court to decide that the lion's share of the water right was not forfeited under an interpretation of the groundwater forfeiture statute that would lead to an absurd and unconstitutional result.

II. Summary of the Facts

The well at issue, LRG-10140, was drilled in 1921 in the then-thriving town of Cutter, New Mexico. **[2-5-15 1 Tr. 242:21-252:21]** The vast majority of the water from the well was used to fill the water tanks of steam engines, which made regular stops at the Cutter depot for such servicing. Ed Landreth, Petitioner's expert witness, in his expert report, noted "the end of the steam locomotive era in 1955." **[Consolidated Ex. 45, p. 4]** In explaining that statement, Landreth testified that "[t]hat's commonly accepted as the big usage of steams, and that's what's in the literature," interpreting it to mean that 80 percent of the regular locomotives were diesel by 1955. **[2-6-15 Tr. 304:18-305:11]**

Landreth's expert report also stated that a railroad right of way map (BNSF 133246) **[Consolidated Ex. 52]** showed the appurtenances to the well were retired in place in 1959, as the town of Cutter had ceased to exist and the railroad track maintenance forces had been relocated. **[Consolidated Ex. 45, p. 6; Consolidated Ex. 52]** Landreth testified that "AFR," short for "Authorized for Retirement," as found on that right-of-way map, meant that the property so

indicated was no longer maintained and was removed from the tax rolls, so that personal property tax no longer needed to be paid on it. **[2-6-15 Tr. 260:15-261:6; 311:23-312:19]**

The State also introduced its own historical evidence. A master's thesis by Chance Coats entitled "Impacts of Potential Development on Groundwater Resources in the Community of Cutter, New Mexico," stated that "[o]nce the Santa Fe [Railway] changed over to diesel locomotives in the later 1940's, the stop [at Cutter for water] was no longer necessary and Cutter was nearly completely abandoned." **[Consolidated Ex. 86 p. 118]**

A history of Sierra County related that the last standing depot was torn down in 1956, when it became no longer necessary for the trains to stop at Cutter. **[Consolidated Ex. 79]** Another historical account, included in both Herald's Chaparral Guides of May, 1973, and a newspaper article "Special to the El Paso Times," stated that "The Santa Fe changed to modern day diesel engines and the trains no longer stopped to water up or unload cinders. In time the section crews were abolished and the bunkhouse and the foreman's house became vacant. Old timers had left the Jornada and moved to town and finally on June 15, 1956, the post office at Cutter was closed." **[Consolidated Ex. 62 and Consolidated Ex. 66]**

Sometime between 1962 to 1964, a well repairman was engaged by a local rancher to repair the well for use to water livestock. Present at the repair was the

repairman's young son, Waldo Johnson, who testified that, at that time, it had been two or three years since the well had been operable. Once repaired, the water ran to a tank, then to some cattle troughs southwest of the tank. **[2-5-15 Tr. 70:21-71:1; 81:25-82:15; 84:25-85:6]**

In October of 1994, the Railway conveyed four parcels of land by quitclaim deed to Kenny Romero and Romero's Farms. One of those parcels was a 158.5 acre parcel in Cutter, identified on the right-of-way map by "falling" crosshatching in sections 34 and 35. **[Consolidated Ex. 52]** The purchase price was $37,000, and the quitclaim deed conveyed all the grantor's rights in land, fixtures and improvements, reserving the mineral estate and an easement to exploit any mineral estate. The deed made no mention of water rights. **[2-6-15 Tr. 318:18-319:10; 2-5-15 Tr. 171:19-25; Consolidated Ex. 1, p. 1]** By 1998, Petitioner had acquired all the interests of Kenny Romero and Romero's Farms in this conveyance. **[2-5-15 Tr. 177:4-181:1]**

Following this acquisition, Petitioner attempted to sell the water rights. His broker, for example, drew up a memorandum of understanding in 2005 with First Street Properties to transfer the rights for $875,000, but the transaction did not close. **[2-5-15 Tr. 205:1-206:15]**

On August 15, 2014, the railroad gave a "Quit Claim Deed" to Petitioner. This deed described itself as a "correction deed . . . to correct an error" in the October 10, 1994 quitclaim from the railroad to Kenny Romero and Romero's

Farms. The deed conveyed any and all groundwater rights associated with well number LRG-10140, without warranting the validity of such rights. **[Consolidated Ex. 21]**

In sum, apart from stock watering, the claimed water right was never used between 1959 and the time of trial in 2015, constituting a total of roughly fifty-five years of nonuse.

III. Summary of the Proceedings Below

The subfile went to trial before a Special Master on the issues of (1) whether the water right was abandoned, (2) whether the water right was forfeited under NMSA 1978 § 72-12-8, and (3) if neither abandoned nor forfeited, what the amount of the water right was. After trial the Special Master filed a report, recommending, *inter alia*, that the adjudication court recognize only the amount of water that had been used for livestock out of well LRG-10140, since the facts found supported both abandonment and statutory forfeiture of the amount of water used for railway purposes.

More specifically, the Special Master found that the State had proven, by clear and convincing evidence, that

> 1) "[B]y no later than 1960 the Railroad had ceased using the Well for any purpose other than watering livestock." **[2 RP 425 ¶ 38; FOF 38)**,
>
> 2) "[W]ater attributable to the Railroad Right has not been used, except for watering livestock, since the Railroad ceased using water in 1960." **[2 RP 430 ¶ 57; FOF 57]**,

3) "[T]he Railroad actually intended to abandon the Railroad Right." **[2 RP 431 ¶ 61; FOF 61]**, and

4) "[T]he Railroad failed to use water for any purpose, other than watering livestock, for 34-years between 1960 and October 1994, when it sold the Cutter Property to the Romeros. Thirty-four years of non-use is an unreasonable period of non-use and raises a presumption the Railroad intended to abandon the Railroad Right. . . . Mr. Romero did not come forward with sufficient evidence to rebut the presumption." **[2 RP 431-432 ¶ 62; FOF 62]**

After argument the adjudication court accepted the findings of the Special Master and entered a final subfile order recognizing only a livestock right out of LRG-10140.

Petitioner appealed the decision, contending in the Court of Appeals that the findings of abandonment and forfeiture were not supported by substantial evidence and that the groundwater forfeiture statute, NMSA 1978 § 72-12-8, does not authorize "partial forfeiture." The Court of Appeals affirmed the district court's judgment, holding that the factual findings supporting the conclusion of forfeiture were themselves supported by substantial evidence, and that New Mexico law required the forfeiture of all but the livestock rights. Because either abandonment or forfeiture would have been sufficient, independently, to uphold the district court's judgment, the Court of Appeals' opinion did not address or review the findings and conclusions relating to common law abandonment of the water rights.

IV. Argument

Petitioner incorrectly characterizes as a matter of first impression the first issue on which certiorari was granted. So-called "partial forfeiture" is not a new doctrine in New Mexico, but a necessary consequence of New Mexico's constitution, which declares that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3. In order to evade the constitutional requirement of beneficial use as the limit and measure of water rights, Petitioner misreads New Mexico's groundwater forfeiture statute, NMSA 1978, § 72-12-8 (A) (2002), to mean that once a groundwater right is established it cannot be limited by beneficial use, but must either be recognized in full or forfeited in full, regardless of the actual amount of beneficial use. This reading of New Mexico's groundwater forfeiture statute offends the plain language of the New Mexico constitution. Nor is it a necessary reading of that statute, as the Court of Appeals made clear in its well-reasoned opinion in this case. Court of Appeals Opinion (COA Op.), pp. 10-11.

Since this first issue is purely a matter of law it is reviewed *de novo*. *Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 20, 129 N.M. 677.

A. New Mexico's Constitutional Beneficial Use Principle Has Always Required "Partial Forfeiture" Because Beneficial Use Measures and Limits Water Rights; No New Doctrine is at Issue in this Case.

The New Mexico Constitution states that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, Sec. 3. This constitutional language mandates that, if water has not been used, the water right is forfeited. New Mexico's forfeiture statutes for both surface water, NMSA 1978 § 72-5-28 (2002), and groundwater, §72-12-8, direct how this constitutional mandate will be carried out, but both statutes must and do comport with this bedrock constitutional requirement.

Under the beneficial use principle in the New Mexico constitution, the Petitioner's water right in this case has been measured and limited to actual beneficial use. Thus, the question in this case is not whether New Mexico's groundwater forfeiture statute should be construed to allow a new doctrine in New Mexico (the so-called "doctrine of partial forfeiture" of groundwater rights). There is no new doctrine at stake here, only the time-honored "use it or lose it" principle that has existed in Western water law from time out of mind, and that is embodied in the New Mexico constitution. *See* B. Leonard and S. Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources*, 59 Nat. Res. J. 135, 173. Characterizing the prior appropriation doctrine that was established in New Mexico and across the West, these authors state:

> To establish a water right, users are required to divert water and put it to "beneficial use." Once established, the rights are subject to the "use it or lose it" doctrine, which threatens the loss of a water right that is not continually put to a legally approved beneficial use, [*citing* Jedidiah Brewer et al., *2006 Presidential Address Water Markets in the West: Prices, Trading, and Contractual Forms*, 46 Econ. Inquiry 91, 94 (2008)]

The requirement that water be put to continuous beneficial use in order to preserve a water right is an integral part of the prior appropriation doctrine that is embedded in New Mexico's constitution.

The prior appropriation doctrine has been the law in New Mexico since well before statehood and has been held repeatedly to apply to underground waters. *Yeo v. Tweedy*, 1929-NMSC-033, 34 N.M. 611. The *Yeo* Court considered the constitutionality of what became the 1931 groundwater code (now codified at Sections 72-12-1 to -28 NMSA 1978 (1931, as amended through 2019)), and traced the prior appropriation doctrine in New Mexico back to Mexican sovereignty days. The *Yeo* Court stated that the prior appropriation doctrine "is the rule best adapted to our condition and circumstances, and the rule which the Legislature has declared." Although the *Yeo* Court ruled that the early version of the groundwater code that it was considering in that case was adopted through an unconstitutional procedure, the Court found that the code itself – nearly identical to the code now found in New Mexico's statutes – was constitutional as to the substance of the water law it embodied. The *Yeo* Court's finding established that

prior appropriation principles, necessarily including the requirement of continuous beneficial use, applied to groundwater as well as surface water. *See also, State ex rel. Bliss v. Dority*, 1950-NMSC-066, 55 N.M. 12 (*citing Yeo*, the *Bliss* Court holds that New Mexico's underground waters are subject to the prior appropriation doctrine, even under lands obtained by federal patent).

The prior appropriation doctrine's long-established requirement of continuous beneficial use is reflected in the "measure . . . and limit" language of N.M. Const. art. XVI, Sec. 3 of the constitution. The language "measure and . . . limit" on its face states that the *amount*—not just the existence—of a water right is tied to actual beneficial use. Unless these words are given their plain meaning that a water right is measured and limited by actual beneficial use, they are effectively treated as synonymous with the word "basis" in the constitutional provision, as if a water right, once established, was immune to the beneficial use requirement. Petitioner offers this nonsensical view of water law, arguing that groundwater rights are "quantum" in nature, **[BIC 27]**, and cannot be reduced to reflect actual beneficial use. This interpretation offends the New Mexico constitution, rendering the words "measure" and "limit" surplusage, contrary to fundamental principles of constitutional construction. *Hannett v. Jones*, 1986-NMSC-047 ¶ 13, 104 N.M. 392, (New Mexico constitution "must be construed so that no part is rendered surplusage or superfluous . . .").

"Basis," "measure," and "limit" have three distinct meanings under a proper reading of the constitutional provision. Beneficial use as the "basis" of a water right requires beneficial use to establish a water right. Beneficial use as the "measure" of a water right defines the amount-of-water element of the water right so established. Beneficial use as the "limit" of a water right mandates, when beneficial use is reduced, that the water right be limited. Thus, the requirement that language be interpreted to give meaning to all of the words of the constitution mandates an interpretation that contemplates that parts of a water right will be forfeited—limited and measured—when beneficial use is reduced.

Another aspect of the prior appropriation doctrine demonstrates further that the constitutional principle of beneficial use precludes the Petitioner's arguments. The prior appropriation doctrine grew out of the arid "condition of the country and the necessities of its citizens." *Snow v. Abalos*, 1914-NMSC-022, ¶ 9, 18 N.M. 681. These necessities, in an arid state, include the need to provide for the forfeiture of water rights in order to ensure that water is conserved for productive uses. A highly respected commentator on water rights, writing contemporaneously with New Mexico's statehood, describes forfeiture as a consequence of these necessities:

> [I]t has been the policy of the legislatures of the various States and Territories to pass enactments providing for the forfeiture of these rights for the failure or neglect to use them for a beneficial purpose.

> The very life of this arid country depends largely upon the use of all of the available water supply. Therefore, by the forfeiture of the rights which are claimed by certain parties, but who fail to use them, the ends of justice are met, and the water is made to do the greatest good to the greatest number. This is upon the correct theory that the continuance of the title to a water right is based only upon continuous user; and where a person claims a certain right which he does not use for a certain period of time, the statute declares that the right to the unused portion is forfeited and available for the appropriation of others.

C. Kinney[1], *On Irrigation and Water Rights,* 2d Ed., Vol.2, § 1118 at 2021-2022, *cited with approval* in *State ex rel. Reynolds v. Mears*, 1974-NMSC-070, ¶ 14, 86 N.M. 510.

Thus, from the beginning, forfeiture was understood as a way to prevent people from gaining water rights and then failing to use them, as the Petitioner and his predecessors in interest have done here. Any other rule would leave room for speculation in water rights, which has been held to be contrary to the prior appropriation system's goal, as articulated by Kinney, to do the greatest good for the greatest number. *See Millheiser v. Long*, 1900-NMSC-012, ¶ 31, 10 N.M. 99, (speculation and monopoly in water rights would defeat "the main object" of the law of prior appropriation).

[1] Petitioner in the BIC p. 31 cites a different passage from Kinney to argue that Kinney believed that the forfeiture of water rights was essentially punitive in nature. While Kinney clearly felt that in forfeiture for non-use "the ends of justice are met," the above-quoted passage demonstrates that he was at least equally concerned with promoting the productive use of water, which has nothing to do with punishment.

As the Court of Appeals pointed out, to construe New Mexico's groundwater statute in the way that Petitioner argues would open the way for speculation and hoarding of groundwater. COA Op. p. 18. A water rights owner could keep an enormous water right alive indefinitely by using only a small portion of it, shutting out productive uses of the remainder and frustrating the purpose of the prior appropriation doctrine to ensure that water is productively used. *Kinney, supra*; *Millheiser, supra*, ¶ 30.

Petitioner's suggestion at **[BIC 35]** – that the circumstances of this case are so unusual that little practical harm would be done by allowing him to exploit this invented loophole to the prior appropriation doctrine – is unpersuasive. The loophole in New Mexico's water laws that the Petitioner proposes would not be confined to the special circumstances here but would apply to all groundwater rights. Petitioner's proposal would mean that a groundwater right, once established, could be limited by beneficial use only when the entire amount of the water right has not been put to beneficial use. This proposed loophole in the prior appropriation doctrine is contrary to the constitution and must be rejected.

B. The Surface and Groundwater Forfeiture Statutes Should be Read to Comport with the Constitution and to Be Harmonious With Each Other.

New Mexico's groundwater forfeiture statute, NMSA 1978 § 72-12-8 (A), states:

> 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.

In keeping with the New Mexico constitution, this statute, considered alone, can and should be interpreted to mean that the beneficial use made of water under a water right is the measure and limit of that right; that is, a water right must be *limited* when only a limited beneficial use has been made of water under that right, and what remains of the water right is *measured* by the beneficial use that actually was made. This constitutionally correct interpretation of the statute was properly applied to the Petitioner's water rights in this case.

The interpretation of the statute offered by the Petitioner – the extraordinary argument that groundwater rights are "quantum," **[BIC 27]**, making them largely exempt from limitation and measurement by the constitutional principle of beneficial use – would put the statute at odds with the New Mexico constitution (as well as more than a century of public policy and case law, see above at **Point I** and below at **Point III**). It should therefore be rejected, regardless of any other statute or regulation. "[I]f a statute is susceptible to two constructions, one supporting it

and the other rendering it void, a court should adopt the construction which will uphold its constitutionality." *Huey v. Lente*, 1973-NMSC-098, ¶ 6, 85 N.M. 597; *See also, Benavides v. Eastern New Mexico Med. Ctr.*, 2014-NMSC-037, ¶ 43, *citing Huey*. Because the groundwater forfeiture statute can be read to be consistent with the constitutional principle of beneficial use, it should be read that way, as the Court of Appeals correctly did.

Petitioner seeks to use differing language in New Mexico's surface water forfeiture statute, NMSA § 72-5-28 (A) to suggest that the New Mexico legislature intended that groundwater not be subject to measurement and limitation by beneficial use. The New Mexico surface water forfeiture statute is more explicit than the groundwater statute in applying the constitutional principle that a water right will be limited and measured by actual beneficial use, stating that forfeiture applies to "all *or any part* of the water" (emphasis supplied) not beneficially used. Because both statutes must comport with the constitution, however, the difference in language makes no difference in interpretation. The result under both statutes is that any part of a water right will be forfeited if it has not been supported by continuous beneficial use, the result reached with respect to the Petitioner's water rights by the Special Master, the adjudication court, and the Court of Appeals. All three tribunals correctly gave full meaning to the "basis, measure and . . . limit" language of the New Mexico constitution, refusing to treat the "measure and . . .

limit" phrase as surplusage. *Hannett v. Jones*, 1986-NMSC-047, ¶ 13, 104 N.M. 392. The interpretation of the two statutes by the Court of Appeals in this case puts them in harmony with the New Mexico Constitution and with each other. It should be upheld.

The Petitioner complains in a variety of ways about the Court of Appeals approach to statutory interpretation. **[BIC 26-28]** None of these complaints has merit. For example, the Petitioner states that the "plain meaning" of the groundwater forfeiture statute is that groundwater rights are "quantum" and "non-divisible," **[BIC 27]**, and that giving the statute this meaning "does not lead to an absurd result." Neither proposition is correct. The groundwater forfeiture statute does not state that groundwater rights are non-divisible; it is simply silent on the question of "partial forfeiture," which renders it effectively ambiguous on that issue. *See* COA Op. pp. 10-11. Further, construing it as the Petitioner argues it should be construed would certainly lead to the absurd result of creating groundwater rights that are immune from New Mexico's constitutional beneficial use requirement. It would also lead to the absurd result that a water rights holder, having once obtained such "quantum" groundwater rights, could keep them alive indefinitely with an amount of beneficial use that is only a fraction of the amount of the right in the hope of speculative profits in the future. In the present case, for example, the value of water rights has seen an enormous increase in the years

between the beginning of the period of non-use of Petitioner's claimed water rights and now. Treating water rights as an opportunity to profit from a market fluctuation, however, as an opportunity for speculation, defeats "the main object" of the prior appropriation doctrine, which is to ensure productive, actual, beneficial use of the water. *See Millheiser v. Long*, 1900-NMSC-012, ¶ 31, 10 N.M. 99. In the light of New Mexico's long-standing policy of encouraging the actual beneficial use of water, it would be absurd to suppose that the legislature intended in the groundwater forfeiture statute to suspend the beneficial use requirement in order to permit financial windfalls. The Petitioner has offered no suggestion of what public policy might be served by the legislature's supposed choice to make groundwater rights quantum and indivisible because there is no public policy served by such a nonsensical interpretation of the statute.

In *State v. Taylor E.*, the Court of Appeals cited to decisions of this Court in an extensive discussion of the rules of statutory construction, stating:

> [T]he "beguiling simplicity" of the plain-meaning rule "may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning." *State v. Rivera*, 2004-NMSC-001, ¶ 11, 134 N.M. 769, 82 P.3d 939. . . . "In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute." *Id.* . . .The literal meaning of a statute also does not control "when such an application would be absurd, unreasonable, or otherwise inappropriate." *Id.*, ¶ 13; *see Atchison, T. & S. F. Ry. Co. v. Town of Silver City*, 1936-NMSC-036, ¶ 13, 40 N.M. 305, 59 P.2d 351 ("Canons of construction

> are but aids in determining legislative intent and are not controlling if they lead to a conclusion, which by the terms or character of the legislation manifestly was not intended." . . .).

2016-NMCA-100, ¶ 27, 385 P.3d 639 (internal comments omitted). Under this analysis, the Court of Appeals was entirely correct to look behind the supposed "plain meaning" that the Petitioner proffers for the groundwater forfeiture statute (a "quantum theory" which is in no way plain) to consider non-frivolous concerns about interpreting a statute in a way that would undermine a constitutional principle. The Court of Appeals was also correct to reject Petitioner's interpretation of the statute because of resulting absurdities that the legislature could not reasonably be thought to have intended.

Petitioner is simply incorrect when he states that rules of statutory construction only "require the harmonization within other provisions of NMSA § 72-12-8," and that it was therefore somehow improper for the Court of Appeals to harmonize the surface and groundwater statutes together. **[BIC 27-28]** This is the opposite of what rules of statutory construction require. The *Taylor E.* case, immediately following the quotation above, goes on to state:

> Among other considerations, "we closely examine the overall structure of the statute we are interpreting, as well as the particular statute's function within a comprehensive legislative scheme[.]" *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 769, 82 P.3d 939 (citation omitted). "[W]henever possible we must read different legislative enactments as harmonious instead of as contradicting one another." *Id.*

2016-NMCA-100, ¶ 28. Any interpretation of the groundwater forfeiture statute must be harmonized with the comprehensive legislative scheme of New Mexico's water code. The Court of Appeals, therefore, was wholly correct not only to consider how to harmonize the surface and groundwater forfeiture statutes, but also to take State Engineer regulations into consideration. Section 19.26.2.20 (A) NMAC, which is codified within the State Engineer regulations regarding surface water, nonetheless cites both the surface and groundwater forfeiture statutes, reflecting, as the Court of Appeals noted, that the two statutes had the same meaning within the comprehensive legislative scheme of New Mexico's water laws. The inclusion of the groundwater forfeiture statute in the surface water regulations demonstrates specifically that it is the State Engineer's interpretation of the statutes that they have the same effect, and the State Engineer's interpretation of the statutes governing State Engineer operations enjoys "persuasive weight." *Montgomery v. New Mexico State Eng'r*, 2005-NMCA-071, ¶ 13, 137 N.M. 659:

> Long-standing administrative constructions of statutes by the agency charged with administrating them are to be given persuasive weight, and should not be lightly overturned, since there is a statutory presumption that the orders of the State Engineer are the proper implementations of the water laws. *See* NMSA 1978, § 72-2-8(H) (1967). Moreover, the more long-standing the State Engineer's interpretation of a statute without amendment by the legislature, the more likely the State Engineer's construction reflects the legislature's intent. *In re Application of Sleeper*, 1988-NMCA-030, 107 N.M. 494, 498, 760 P.2d 787, 791 (Ct. App. 1988).

The Court of Appeals' analysis of the groundwater forfeiture statute comports with the comprehensive constitutional and legislative scheme that expresses New Mexico's prior appropriation doctrine. It should be upheld.

C. Case Law Demonstrates that Under New Mexico's Comprehensive Water Law Scheme, the "Measure and . . . Limit" Language of the Beneficial Use Constitutional Provision Applies to Both Surface and Groundwater.

New Mexico case law repeatedly states that, beyond some administrative differences at the appropriation stage, there is no distinction between a surface water right and a groundwater right. *Yeo v. Tweedy*, 1929-NMSC-033, 34 N.M. 611; *State ex rel. Bliss v. Dority*, 1950-NMSC-066, 55 N.M. 12; *Pecos Valley Artesian Conservancy Dist. v. Peters*, 1945-NMSC-029, 50 N.M. 165; *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467. In *City of Albuquerque v. Reynolds*, this Court put it as strongly as possible:

> The mere fact that the territorial legislature in the water code, Chapter 49, Laws 1907, dealt only with surface waters and therein gave the territorial engineer certain jurisdiction over these waters does not, as argued by the city, imply a legislative intention that subsequent statutes dealing with underground waters are to be looked upon and treated entirely separate and apart as though dealing with two entirely different subjects. The jurisdiction and duties of the state engineer with reference to streams and underground waters are the same. They each relate to public waters subject to use by prior appropriators. There does not exist one body of substantive law relating to appropriation of stream water and another body of law relating to appropriation of underground water. The legislature has provided somewhat different administrative procedure whereby appropriators' rights may be secured from the two sources but *the substantive rights, when obtained, are identical.*

1962-NMSC-173, ¶ 28, 71 N.M. 428 (emphasis added). In the present case, the water rights at issue were obtained many decades ago. The stage during which the appropriators were securing their rights—the only stage during which there are some procedural differences between the surface and groundwater codes—is long, long past and has no possible relevance to the present situation of these rights. Therefore, the waters rights owned by the Petitioner are, for legal purposes, *identical* to surface water rights.

The *City of Albuquerque* Court continued in the same ¶ 28, making even more clear the identical nature of established surface and groundwater rights by citing to the fact that the prior appropriation doctrine has always applied to groundwater:

> In the *Pecos Valley Artesian Conservancy District* case, [1945-NMSC-029, 50 N.M. 165, 173 P.2d 490], we referred to the opinion of Mr. Justice Watson in the case of *Yeo v. Tweedy*, [1929-NMSC-033, 34 N.M. 611, 286 P. 970], and said: "* * * This thought stands out in the opinion and holding of the court, namely, that legislative enactments classifying [groundwater] as public and subject to appropriation are merely declaratory of the state of the law prior to such legislation and that except for any differences compelled by their subterranean character, such waters are affected with all the incidents of surface waters as to use, appropriation and administration. * * *"

Id. Because surface and groundwater rights are, once established, identical and affected with the same legal incidents, and because there is nothing in their subterranean character that would justify exempting groundwater rights from

"partial forfeiture," there can be no difference in how surface and groundwater are affected by non-use. "Partial forfeiture" – that is, the constitutional principle that beneficial use measures and limits a water right – applies to both surface and groundwater and has always applied to both. The Court of Appeals was correct to reject the Petitioner's efforts to overturn well-established case law and to manufacture a difference between surface and groundwater rights that does not exist.

The Petitioner argues irrelevantly that "[t]he 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." **[BIC 28]** The paragraphs that follow this statement seem intended to argue that, because there has not been in New Mexico a case that explicitly forfeits the unused portion of a groundwater right (this claim is doubtful – the final result of *State ex rel. Erickson v. McLean*, 1957-NMSC-012, 62 N.M. 264, is not clear from the reported case), this Court cannot conclude that "partial forfeiture" of a groundwater right is supported by New Mexico case law. This argument reflects the Petitioner's failure to accept that surface and groundwater rights in New Mexico, once established, are identical to each other.

Because surface and groundwater rights, once established, are identical to each other and are affected with the same legal incidents, New Mexico case law that discusses the forfeiture of surface water rights can be directly applied to the forfeiture of groundwater rights. *See, e.g., State ex rel. Reynolds v. South Springs Co.*, 1969-NMSC-023, ¶ 9, 80 N.M. 144, in which the Court stated:

> By the forfeiture of the rights which are claimed by appellants, but who failed to use them, the policy of our constitution (Art. XVI, §§ 1, 2 and 3) and statutes (§ 75-11-2, N.M.S.A., 1953 Comp.) is fostered, and the waters made to do the greatest good to the greatest number. This is on the theory that the continuance of the title to a water right is based upon continuing beneficial use, and where the right is not exercised for a certain period of time (four years), the statute declares that the right to the unused portion is forfeited. See W. Parr, Comments, Water Rights, Failure to Use, Forfeiture, 6 Natural Resources J. 127 (1966).

This analysis by the *South Springs* Court is, as demonstrated above, consistent with long-standing principles of New Mexico water law. It applies equally to all water rights, whether surface or ground, both because those types of water rights are identical once established, and because surface and groundwater statutes are equally subject to the constitutional principles invoked by the *South Springs* Court.

Petitioner dismisses the relevance of *State ex rel. Erickson v. McLean*, 1957-NMSC-012, 62 N.M. 264, on the grounds that it discusses waste, **[BIC 31]**, failing to see that *Erickson* treats the waste of water not as a separate illegality, but as a use of water that does not constitute *beneficial* use. Because waste of water is not a beneficial use, the *Erickson* Court finds, it cannot serve as a defense to the

forfeiture of a water right. In other words, the water rights owners in that case forfeited their water rights because they failed to make beneficial use of water for a four-year period, exactly like the Petitioner here; the fact that they wasted water during that four-year period did not prevent forfeiture. *See also State v. Hagerman Water Right Owners (in Re Srba Case No. 39576)*, 130 Idaho 727, 735, 947 P.2d 400 (1997) ("If a water user cannot apply a portion of a water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, a forfeiture has taken place"). The relevance of *Erickson* is further underscored by the fact that the water right at issue in that case was a groundwater right.

Petitioner's discussions of *Yeo v. Tweedy*, 1929-NMSC-033, 34 N.M. 611, and *El Paso & R. I. Ry. Co. v. Dist. Court of Fifth Judicial Dist.*, 1931-NMSC-055, 36 N.M. 94, **[BIC 29-30]**, also reflect the Petitioner's unwillingness to accept this Court's statement in *City of Albuquerque* that surface and groundwater rights, once established, are identical and affected with the same legal incidents. The *City of Albuquerque* case was decided long after both *Yeo* and *El Paso & R. I. Ry. Co*, and cited to both cases. *City of Albuquerque*, ¶¶ 26, 28. Thus, there cannot be anything in those cases which precludes the *City of Albuquerque* Court's analysis of New Mexico law.

Finally, the Petitioner complains of the Court of Appeals' reliance on an Idaho case, *Hagerman*, 130 Idaho 727, 947 P.2d 400. The *Hagerman* Court finds squarely that partial forfeiture is allowed under Idaho law for many of the reasons given above – that it comports with long-standing administrative practice and that it promotes important policy goals, including the economical use of water. *Id., passim.* Unlike New Mexico, Idaho does not embed the principle of beneficial use in its constitution, so that the overriding argument under New Mexico law for partial forfeiture does not apply in Idaho. Yet it was clear to the Idaho court that partial forfeiture had for many years been an important part of existing Idaho law and furthered the goals of Idaho's water law scheme.

Petitioner observes rightly that the Idaho water law in question in that case was different from New Mexico's groundwater forfeiture statute, but those differences do not support the Petitioner's case. In actuality, the Idaho statute provides a stronger basis for Petitioner's arguments than does the New Mexico one, and yet the Idaho Supreme Court still rejected those arguments. The New Mexico statute states:

> 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.

Petitioner's claim that this statute describes "quantum" groundwater rights precluding partial forfeiture can only be based on an argument that the statute provides that when there has been non-use "the water rights" shall be forfeited, rather than some portion of the water rights. That is, because there is nothing in the statute saying explicitly that only *some* rights are forfeited (to the extent of the non-use) it must be concluded that groundwater rights are "quantum" and "non-divisible," **[BIC 26]**, and that either *all* rights are forfeited or none. As discussed above, this interpretation of the statute is neither compelling nor necessary, as well as being in conflict with the New Mexico constitution. *See* **Point I**, *above*.

This is also the argument that was specifically rejected in the *Hagerman* case, even though the Idaho statute actually uses the word "all" in describing the rights that are subject to forfeiture. The Idaho statute at issue in the *Hagerman* case reads, in relevant part:

> *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 the beneficial use for which it was appropriated and when any right to the use of water shall be lost though nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter....

Idaho Stat. Ann. § 42-222 (*emphasis added*). The Idaho statute, by stating that "*all rights* . . . shall be lost and forfeited . . .," provides better support for the Petitioner's quantum theory of groundwater rights than does the New Mexico statute, suggesting by the use of the emphasized phrase that the application of the statute could only result in a loss of "*all rights*," rather than a portion of the rights. The trial court in the *Hagerman* case made precisely this argument, ruling that the phrase "all rights" meant that only an entire right could be forfeited, which implied that partial forfeiture was not contemplated in the statute. *Hagerman*, p. 733. The Idaho Supreme Court flatly rejected this analysis, holding that "The use of the word 'all' in Idaho Stat. Ann., Section 42-222(2) does not unambiguously close the door on the possibility of partial forfeiture."

This reasoning applies with even greater force to the New Mexico statute, which does not even use the word "all." Thus, although the Petitioner is correct that the Idaho statute interpreted in *Hagerman* is different than the New Mexico groundwater forfeiture statute, the differences cut against the Petitioner's arguments. In the face of a statute more favorable to the Petitioner than New Mexico's statute, and even in the absence of a constitutional mandate regarding beneficial use, the Idaho Supreme Court recognized that partial forfeiture must be accepted as a long-standing part of the Idaho water law scheme and was important to promote the policy goals of Idaho water law. The Court of Appeals relied

appropriately on the *Hagerman* case in making its well-reasoned and solidly founded decision to reject the Petitioner's efforts to re-write New Mexico water law.

D. The Court Need not Address the Second Issue on Which Certiorari Was Granted, Because Petitioner Failed to Present Argument on that Issue.

The second issue on which *certiorari* was granted is not entirely clear, and seems to be asserting that, should the forfeiture finding be reversed here, the case should be remanded to the Court of Appeals for consideration of the abandonment finding not there considered. Whatever its intent, it is not argued in the Petitioner's Brief-in Chief and therefore neither the State nor the Court need address it. *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, n.1, 306 P.3d 457 (*citing State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 513: "[T]his Court will not review issues raised in appellate briefs that are unsupported by cited authority.").

E. Brief Response to Certain Irrelevant Arguments Improperly Included in the Petitioner's BIC.

This Court granted certiorari on only one claimed legal error by the Court of Appeals, the recognition of the livestock use while finding the railroad use forfeited. Nevertheless, in both the Summary of Facts and Proceedings and the argument, Petitioner questions the facts found below. This is improper not only in arguing an error not raised on certiorari, but because it fails to comply with Rule

12-318 NMRA that "A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing on the proposition." Thus, Petitioner's arguments are improper and should be disregarded. Nevertheless, out of an abundance of caution, the State shall respond briefly to Petitioner's factual complaint.

On page 22 of his Brief in Chief Petitioner argues that the Special Master was in error to find that steam locomotives were not operating after 1960, arguing that a particular piece of evidence by Waldo Johnson to that effect was hearsay, while Petitioner had offered evidence otherwise. But re-weighing evidence is expressly forbidden, even to a court reviewing a "substantial evidence" challenge. *State Engineer v. United States*, 2013-NMCA-023, ¶ 18, 296 P. 3d 1217. If this Court were to reach a substantial evidence question, the only issue would be whether *any* substantial evidence in the record supports the finding that steam engine operations ended in 1960.

Substantial evidence for the proposition that steam engine operations ended in 1960 clearly exists in the record, quite apart from Mr. Johnson's testimony. For example, Petitioner's own expert submitted a report referring to "the end of the steam locomotive era in 1955," and that "[t]he railroad right of way map (BNSF 133246) **[Consolidated Ex. 52]** shows the appurtenances to Well No. 6 [LRG-

10140] was retired in place in 1959, as the town of Cutter had ceased to exist and the railroad track maintenance forces had been relocated." **[Consolidated Ex. 45, pp. 4, 6, Consolidated Ex. 52]** A study of water resources in the area noted that once the railroad "changed over to diesel locomotives in the late 1940's, the stop was no longer necessary and Cutter was very nearly abandoned." **[Consolidated Ex. 86, p. 9]** A history of Sierra County related that "the last standing depot was torn down in 1956, when it became no longer necessary for the trains to stop at Cutter." **[Consolidated Ex. 79]** Johnson's testimony that LRG-10140 had been inoperable for two to three years between 1960 and 1964 corroborates those other facts. Further, if the statement itself was hearsay, it was elicited by Petitioner's own attorney, without objection. Hence there was substantial evidence that steam engine service ended by 1960. If the Court reaches this issue, despite its being outside the issues for which *certiorari* was granted, the Petitioner's arguments should be rejected as groundless.

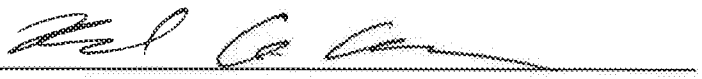
V. Conclusion

The issue in this case is of great importance to New Mexico. New Mexico is an arid state. As this Court found in *State ex rel. Erickson v. McLean*: "The need for water is imperative, and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the state an exercise of its police power, not only to ascertain rights, but also to regulate and protect them."

1957-NMSC-012, ¶ 28, 62 N.M. 264. Under these circumstances, and since New Mexico's need for water will almost certainly increase in the future, the duty to "regulate and protect" water rights requires careful attention to the correct interpretation of New Mexico's constitution and statutes in light of the important public policies behind the requirement of beneficial use. Beneficial use under New Mexico's constitution is not only the basis for a water right, it also *limits* a water right and is the *measure* of that right. N.M. Const., art. XVI, Sec. 3. This can only mean that water rights will be reduced – that is, forfeited – to the extent they are not used. Because this is a constitutional provision it applies to both surface and groundwater. Any other rule would allow hoarding and speculation of groundwater, contrary to well over a century of explicit public policy in New Mexico. *Millheiser v. Long*, 1900-NMSC-012, 10 N.M. 99.

The Court of Appeals below reached the correct conclusion regarding the Petitioner's proposed loophole in New Mexico water law, and provided a well-reasoned interpretation of New Mexico's surface and groundwater forfeiture statutes. This Court should uphold that opinion, dismissing or quashing the writ of certiorari. In the alternative, this Court could issue its own opinion recognizing the broader constitutional and public policy support for the result reached by the Court of Appeals.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of April, 2020 the foregoing was electronically filed and served on all counsel of record through the Court's Odyssey file and serve system as follows:

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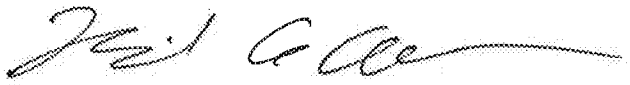

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