

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

MIMBRES VALLEY IRR. CO.,
Plaintiff,

AUG 14 2006

v.

TONY SALOPEK *et al.*,
Defendants,

Docket No. 26,388
Luna County
CV-66-6326

JOHN R. D'ANTONIO, JR.
NEW MEXICO STATE ENGINEER,
Plaintiff-in-Intervention/Appellant,

v.

SAN LORENZO COMMUNITY DITCH
ASSOCIATION,
Defendant/Appellee.

*Appeal from the Sixth Judicial District Court
Luna County Cause No. CV-66-6326*

The Honorable J. Norman Hodges, District Judge under Designation

BRIEF IN CHIEF

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JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER'S
BRIEF IN CHIEF

The plaintiff-in-intervention/appellant, John R. D'Antonio, Jr., New Mexico State Engineer (the "state engineer"), submits this Brief in Chief pursuant to Rule 12-213 NMRA 2005. The state engineer appeals the adjudication court's denial of the state engineer's Motion to Amend the January 14, 1993 Final Decree. In that motion, and also in a later motion for reconsideration, the issue was raised, briefed and argued that jurisdiction over the administration of water rights belongs to the state engineer under New Mexico's constitution and statutes. The adjudication court's effort to retain jurisdiction is thus improper under New Mexico law. Further, it interferes with sound public policy in the field of water, as expressed both legislatively and in New Mexico case law.

SUMMARY OF PROCEEDINGS

This case was filed on March 21, 1966 pursuant to NMSA 1978, § 72-4-17 (1965), which sets out the process for water rights adjudication in the courts of New Mexico.¹ Water rights within the Mimbres River stream system were adjudicated by Final Decree entered by the adjudication court on January 14, 1993. (R.P. 15). This action should have ended the case. The adjudication court, however, improperly provided in the Final Decree that it retained jurisdiction "for the administration of this Final Decree, including the appointment of a water master." (R.P. 18). The court cited no authority for this exercise of power, and did not discuss New Mexico statutes specifically and explicitly vesting the New Mexico State Engineer with the authority to administer water, see, e.g. NMSA 1978, §§ 72-2-1 (2005); 72-2-9 (1907); 72-2-9.1 (2003), as well as specifically and explicitly vesting the state engineer with authority to appoint water masters. NMSA 1978, §§ 72-3-1, *et seq.* (R.P. 15-18). Article XVI, Section 2 of the New

¹ The state engineer filed a Complaint-in-Intervention in the action on March 31, 1970. (R.P. 1).

Mexico Constitution provides that it is the legislature that determines who has the authority over administration of water and water rights. The legislature has given this duty to the state engineer exclusively. N.M. CONST. art. XVI, § 2.

Because the state engineer is statutorily charged with the administration of water and the appointment of water masters, the state engineer moved the adjudication court to relinquish its improper assertion of jurisdiction over the administration of water. (R.P. 219). By memorandum opinion filed on November 17, 2005, the adjudication court stated its intention to deny the State's motion, (R.P. 390), and directed counsel for the San Lorenzo Community Ditch Association (SLCDA) to prepare a proposed order. (R.P. 397). The state engineer filed a Motion for Reconsideration and Objection to Proposed Order on December 16, 2005 asking the court to enter the following proposed conclusion of law: "The Court concludes that it does not have continuing jurisdiction over administration of water rights as adjudicated herein in the 1993 Final Decree." (R.P. 403). In the alternative, the state engineer requested that the adjudication court include explicit findings to support its implied conclusion that it had jurisdiction to administer water. (R.P. 403).

By orders entered on January 5, 2006, the adjudication court denied both the state engineer's July 21, 2005 Motion to Amend the Final Decree and the December 16, 2005 Motion for Reconsideration and Objection to Proposed Order. (R.P. 424, 425). The court offered no authority in support of its denials. Id. It is from these orders that the state engineer appeals.

The state engineer preserved the issue for appeal in both the State Engineer's Motion to Amend the January 14, 1993 Final Decree, (R.P. 222, ¶ 14);² in the State Engineer's Reply to

² The State Engineer's Motion to Amend the January 14, 1993 Final Decree argued that "[i]n the absence of an order of the Court relinquishing jurisdiction over administration of the Final

SLCDA's Respond to the Motion to Amend by asserting that administration of water by adjudication courts is legally suspect, (R.P. 272); and in the State Engineer's Motion for Reconsideration and Objection to Proposed Order filed on December 16, 2005, in which the state engineer raised the issue as to whether the court has jurisdiction to administer water rights and to appoint a water master. (R.P. 397).

STATEMENT OF THE ISSUE

The issue raised in this appeal is as follows: In light of the legislature's exclusive constitutional authority to enact the statutes that explicitly grant the state engineer the exclusive authority over the administration of water and water rights, does the adjudication court's assertion of jurisdiction over the administration of water offend statutory law and constitute a violation of the separation of powers provision of Article III of the New Mexico Constitution?³

STANDARD OF REVIEW

The standard of review for this matter involving subject matter jurisdiction is de novo. Weddington v. Weddington, 2004-NMCA-034, ¶ 13, 135 N.M. 198, 202, 86 P.3d 623, 627 ("This Court reviews subject matter jurisdiction de novo."). "[S]ubject matter jurisdiction cannot be waived and may be raised for the first time on appeal." Gonzales v. Surgidev Corp., 120 N.M. 133, 138, 899 P.2d 576, 581 (1995)(citation omitted).

ARGUMENT

The adjudication court's assertion of jurisdiction to administer water rights in this case is groundless and in conflict with New Mexico's constitutional and statutory scheme regarding

Decree to the state engineer, there is potential for conflict due to overlapping jurisdictional mandates between this Court and the OSE." (R.P. 222, ¶ 14).

³ The language of this statement of the issue varies slightly from that contained in the state engineer's docketing statement in order to better frame the issue for the Court. The issue, however, remains exactly the same.

water. New Mexico's statutes clearly place responsibility for the administration of water on the state engineer. No authority exists for the courts to undertake this task, which is a separate undertaking from the adjudication of water rights. The adjudication court's failure to honor the statutory distinction between the adjudication of water rights and the administration of water is in conflict with ordinary rules of statutory construction, ignoring the plain meaning of the language of a variety of statutes. Further, this failure violates the separation of powers doctrine in Article III, Section 1 of the New Mexico Constitution. The history of this case illustrates the wisdom of the legislature in making the distinction between adjudication and administration.

I. THE CONSTITUTION DESIGNATES TO THE LEGISLATURE RESPONSIBILITY FOR IMPLEMENTING THE DOCTRINE OF PRIOR APPROPRIATION, AND THE LEGISLATURE SPECIFICALLY CONFERRED ADMINISTRATION OF WATER AND WATER RIGHTS ON THE STATE ENGINEER AND NOT THE COURTS

The New Mexico Constitution vests the legislature with full authority to legislate regarding the State's waters. Article XVI, Section 2 provides that "[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, *in accordance with the laws of the state.*" N.M. CONST. art. XVI, § 2 (emphasis added). To carry out this constitutional directive, the legislature established a comprehensive scheme whereby the courts adjudicate New Mexico's water rights and the state engineer administers them. The Mimbres adjudication court's improper effort to retain jurisdiction to administer water ignores this carefully considered and workable scheme, violating legislative intent.

A. The State Engineer's Authority to Administer Water and Water Rights is Well-Established and Fully Occupies the Field

The legislature has since before New Mexico statehood plainly conferred oversight of appropriation of water and administration of water rights on the state engineer. Section 72-2-1,

originally enacted in 1907 as part of comprehensive legislation know as "the New Mexico Water Code," provides that the state engineer "has the general supervision of waters of the state and of the measurement, appropriation, [and] distribution thereof" NMSA 1978, § 72-2-1 (2005). Section 72-2-9, enacted simultaneously, provides that the state engineer "shall have the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts." NMSA 1978, § 72-2-9 (1907). This latter statute clearly contemplates the legislature's intent not only that water administration will be done in New Mexico by the state engineer, but also that it will be done on the basis of both the completed adjudications of the courts and the state engineer's own administrative decisions in the licensing process.⁴

Other early statutes not only emphasize the state engineer's authority to administer water, but vest in the state engineer the specific authority to appoint water masters, which the adjudication court has improperly attempted to do here. See Sec. I, B., *infra*. Section 72-3-1 provides that the state engineer may establish water districts for the efficient administration of the state's waters. NMSA 1978, § 72-3-1 (1919). To assist in that endeavor, Section 72-3-2 specifically confers upon the state engineer the authority to appoint water masters who "shall have immediate charge of the apportionment of waters in his district under the general supervision of the state engineer." NMSA 1978, § 72-3-2 (1907).

⁴ State engineer licenses are the final step in the permitting process for water rights. Thus, in Section 72-2-9, the legislature contemplated that the court-adjudicated water rights in an adjudication decree would be only one part of the information that would be used to administer water. The second part would be the administrative adjustments to water rights that occur routinely before the state engineer. This sensible arrangement is destroyed if the court improperly undertakes administration on the basis of adjudicated rights alone, as the Mimbres court has attempted to do. See Sec. IV, *infra*.

Other statutes demonstrate that the legislature was concerned that the state engineer be able to act quickly where the administration of water was urgently needed, and have broad powers to meet those needs. Section 72-4-20, originally enacted in 1941, provides that where there is interstate litigation on a stream, "it shall be the duty of the state engineer to assume control of all or any part of such interstate stream and of the diversion and distribution of the waters thereof and to administer the same in the public interest." NMSA 1978, § 72-4-20 (1941).⁵ Finally, to emphasize the state engineer's broad powers, Section 72-2-8 provides that the state engineer "may adopt regulations and codes to implement and enforce any provision of any law administered by him and may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties." NMSA 1978, § 72-2-8 (1967). The plain meaning of these statutory provisions is that the state engineer has the authority to administer water. The Supreme Court has commented favorably in dicta on the proposition that "the State Engineer is given exclusive power with reference to administration and disposition of water under orders of the court adjudicating the water rights themselves." Village of Springer v. Springer Ditch Co., 47 N.M. 456, 461, 144 P.2d 165, 169 (1943).

Recent statutory law recognizes the long-standing authority on the part of the state engineer to administer water and directs him to use his broad regulatory authority in the service of undertaking immediate administration, which he has done specifically in the Mimbres. (See, e.g., R.P. 410). In 2003, at the request of the Attorney General, the legislature passed and the governor signed into law NMSA 1978, § 72-2-9.1, which states at paragraph (A):

⁵ The Mimbres is not an interstate stream. This provision is cited here to show that it was the legislature's intent that the state engineer have the authority to administer water where the public interest urgently required it, without regard for the status of court action. The adjudication court's usurpation of state engineer authority to administer water, if adopted in other areas of the state, would interfere with the legislature's clear intent in this statute.

The legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.

The statute goes on to direct the state engineer to adopt rules for administration. *Id.* at paragraph (B). Accordingly, the state engineer has adopted general rules and regulations for the administration of water. *See* 19.25.13.1 NMAC *et seq.* These regulations establish a state-wide initiative called the “Active Water Resources Management” (AWRM) program, through which the state engineer intends to provide water administration on a consistent basis throughout the state. *See, e.g.,* 19.25.13.2 NMAC (“The state engineer adopts these rules and regulations to undertake the supervision of the physical distribution of water, to prevent waste, and to administer the available supply of water by priority date or by alternative administration, as appropriate. These rules apply to all water rights within the state from all sources of water, surface water and hydrologically connected groundwater.”).

Pursuant to these general rules and regulations, on December 16, 2005, the state engineer ordered the creation of the Upper Mimbres Water Master District (District) and the appointment of a water master to administer water rights within the District. (R.P. 410). Thus the state engineer is actively engaged in the administration of water in the Mimbres area, pursuant to statute, and fully occupies the field.

B. No Statutory Authority Exists for the Courts to Exercise Jurisdiction Over the Administration of Water or Water Rights

Given the above history, there can be no question that the New Mexico statutes entrust the duty of water administration to the state engineer. Significantly, moreover, the statutes are absolutely devoid of any mention or suggestion of court-supervised water rights administration. This omission must be understood to have been intentional on the legislature’s part, as there are

many instances in the Water Code where the legislature explicitly involved the courts. NMSA 1978, § 72-4-17 (1965), for example, governs lawsuits for the adjudication of water rights. The Attorney General, however, has specifically taken the position that “[t]he water adjudication statutes do not make provision for the reservation or continuing exercise of jurisdiction after decree adjudicating water has been entered.” 1939 Op. Att’y Gen. N.M. 107. The adjudication statutes, therefore, do not provide a basis for suggesting that an adjudication court has jurisdiction to administer water or water rights. Nor do other statutes explicitly involving the courts suggest a different conclusion. See, e.g., NMSA 1978, § 72-7-1 (1971)(providing procedures for appeals of state engineer action or decision to the district court).

In general, had the legislature intended for the courts to play a role in the administration of water, it would have said so. Hanson v. Turney, 2004-NMCA-069, ¶ 12, 136 N.M. 1, 4, 94 P.3d 1, 4 (had the legislature intended to put in place the reading of water law proposed by the appellants in that case, “it knew how to draft a statute that would successfully do so”). Nothing in New Mexico’s statutes – which, under the constitutional directive to the legislature at Article XVI, Section 2, entirely govern the field of water – supports or justifies the district court’s assertion of jurisdiction to administer water in this case.

Further, nothing in the rules governing New Mexico’s courts supports the adjudication court’s appointment of a master to perform water administration. A final decree has been entered in this case. (R.P. 15). Under Rule 1-053 NMRA 2005, however, masters may only be appointed by district courts in “pending” cases. It is “the general rule . . . that a case is no longer considered to be pending after a final judgment is filed.” See In re Held Orders of U.S. West Communications, 1999-NMSC-024, ¶ 13, 127 N.M. 375, 379, 981 P.2d 789, 793. Therefore, following the final judgment in this case, the adjudication court does not have authority under

Rule 1-053 to appoint a water master. In fact, the adjudication court held, in its July 14, 2004 Order Denying Motion and Request for Attorney's Fees, that its appointment of the now-retired Mimbres water master was *not* made pursuant to Rule 53. (R.P. 126). This, however, far from curing the problem, merely leaves it unclear under what authority the adjudication court believed itself to be proceeding in appointing a water master. The only identifiable source of authority to appoint water masters under New Mexico law is the state engineer's statutory authority pursuant to NMSA 1978, § 72-3-2 (1907).

The state engineer acknowledges that the position asserted in this appeal – that courts lack jurisdiction to administer water – is contrary to the position asserted earlier in this case by the State when represented by Peter White, who then served as general counsel to the state engineer and who is now counsel for SLCDA. In the absence of any constitutional or statutory basis for Mr. White's position in 1993, however, and in the light of the statutory history discussed above – particularly the recent express invocation of state engineer authority to administer water in NMSA 1978, § 72-2-9.1 (2003) – the state engineer believes that his previous position was simply wrong. The state engineer has always had the authority to administer water, and, pursuant to Section 72-2-9.1, is moving forcefully to exercise that authority. (R.P. 410). At no time did the state engineer, however, have the authority to delegate to the adjudication court the state engineer's statutory duty to administer water and water rights. See State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (“Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.”). His error in purporting to do so must be corrected.

II. THE ADJUDICATION COURT'S ASSERTION OF JURISDICTION TO ADMINISTER WATER AND WATER RIGHTS FAILS TO OBSERVE THE DISTINCTION BETWEEN ADJUDICATION AND ADMINISTRATION, CONTRARY TO THE PLAIN MEANING OF THE STATUTES

The state engineer administers water pursuant to NMSA 1978, § 72-2-1 (2005) and water rights pursuant to NMSA 1978, § 72-3-1 (1919). The courts have authority to adjudicate water rights pursuant to NMSA 1978, §§ 72-4-15 (1907) and -17 (1965). The two duties of administration and adjudication address two distinct aspects of water law. Water and water rights administration deals with the physical distribution of the water supply under New Mexico's constitutionally established doctrine of prior appropriation. See NM CONST. art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."). Administering water in priority means that, in a water short year, the diversion and use of water by water right owners with late priority dates ("junior water rights") is subject to being curtailed in order to protect the available water supply for water right owners having the "better" rights; that is, earlier priority dates or senior water rights. See NMSA 1978, § 72-2-9.1 (2003).

The state engineer must also administer water in accordance with the constitutional precept that "[b]eneficial use shall be the basis, the measure and the limit of a water right." See NM CONST. art. XVI, § 3. This means that the state engineer must ensure that, whatever right to the use of the State's waters someone might have, claim, or have been adjudicated, the amount of water delivered is no greater than that amount necessary for the actual beneficial use to be made of it, irrespective of priority. See State ex rel. Erickson v. McLean, 62 N.M. 264, 270, 308 P.2d 983, 987 (1957); see also NMSA 1978, § 72-5-18 (2003). Thus, the state engineer's

administrative duties are concerned with the on-the-ground realities of the “measurement, appropriation [and] distribution” of water supply. NMSA 1978, § 72-2-1 (2005).

A water rights adjudication by a court has a different focus. Adjudication of legal rights to the use of water was, at least originally, intended to be done “in order that the amount of unappropriated water subject to disposition by the state under the terms of this chapter may become known.” NMSA 1978, § 72-4-15 (1907). Toward this end, the adjudication statutes contemplate massive, comprehensive cases where whole stream systems are to be surveyed, all rights are to be adjudicated, and all claimants are to be parties. See El Paso & R. I. Ry. v. District Court, 36 N.M. 94, 102, 8 P.2d 1064 1069 (1931). The adjudication cases, therefore, which involve long-term complex questions and hundreds, if not thousands, of water rights, address the legal framework of water rights that exists regardless of the supply of water at any given time.

Given the explicit statutory scheme assigning separate, defined duties to the courts and the state engineer in the area of water, the issue before this Court is not a question of the adjudication court’s inherent jurisdiction to construe its own judgments and orders. Rather, it is an issue of statutory construction. Where the legislature plainly intended that the role of the courts be adjudication, while the state engineer was to assume responsibility for administration of water and water rights, the assertion of administrative jurisdiction by the judicial branch is impermissible. In Derringer v. Turney, the New Mexico Court of Appeals held that the special statutory scheme relating to appeals from state engineer proceedings, “however cumbersome it may be,” cannot be overridden by the courts. 2001-NMCA-075, ¶ 5, 131 N.M. 40, 43, 33 P.3d 40, 43 (quoting In Re Application of Angel Fire Corp., 96 N.M. 651, 652, 634 P. 2d 202, 203 (1981)). The appellate court reached this conclusion by examining the plain language of the statutes, citing State ex rel. State Engineer v. Lewis, 1996-NMCA-019, 121 N.M. 323, 325, 910

P.2d 957, 959 for the proposition that “[i]f the meaning of a statute is truly clear, it is the responsibility of the judiciary to apply it as written and not second guess the legislature’s policy choices.” See also Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 530, 928 P.2d 250, 256 (recognizing that unless a statute violates the Constitution, “[w]e will not question the wisdom, policy, or justness of legislation enacted by our Legislature.”). Under these principles, the clear intent of the legislature that the state engineer administer water and water rights should be respected.

These principles have been applied in other contexts, as well. In State v. Tarver, 2005-NMCA-030, 137 N.M. 115, 108 P.3d 1, this Court concluded that the district court did not have jurisdiction to order a prisoner’s transfer because the legislature clearly intended that the Department of Corrections only – and not the courts – could make transfer decisions. In reaching this conclusion, the Court of Appeals noted that “[w]hen construing statutes, our primary task is to give effect to the intent of the legislature.” Id. at ¶ 9, 137 N.M. at 117, 108 P.3d at 3. Where the legislature’s intent is not vague, courts will not interpret a statute, but rather will enforce its plain meaning. See State v. Rivera, 2004-NMSC-001, ¶ 10, 134 N.M. 769, 770, 82 P.3d 939, 941 (noting that “when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.”).

The appellate courts’ approach in these cases allows the courts to avoid the constitutional issue that arises from competing assertions of jurisdiction. In Lovelace Med. Ctr. v. Mendez, the Supreme Court rejected a reading of a statute that would have forced the court to consider a separation of powers issue, and noted: “It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions.” 111 N.M. 336, 340, 805 P.2d 603, 607 (1991)(citation omitted).

That analysis applies strongly here. The water and water rights administration statutes and water rights adjudication statutes are *in pari materia*, and should be construed to function in harmony under the presumption that the legislature – in enacting the variety of statutes recognizing the state engineer’s authority to administer water and water rights including, most recently, Section 72-2-9.1 – acted with full knowledge of relevant statutory and common law. See State ex rel. Quintana v. Schnedar, 115 N.M. 573, 855 P.2d 562 (1993) (where the court read two statutory schemes regarding indigence *in pari materia*, and concluded that the latest of the statutes was not intended to conflict with existing law, but was intended to form part of a comprehensive scheme in which the courts and an administrative agency work together to accomplish an objective). The way to harmonize the water and water rights administration statutes and the water rights adjudication statutes is to confine the task of the courts to the adjudication of water rights and to recognize in the state engineer the exclusive authority to administer water and water rights.

Such a recognition is the mirror image of the sound public policy expressed by the New Mexico Supreme Court in the seminal water case of El Paso & R. I. Ry. Co. v. District Court, 36 N.M. 94, 8 P.2d 1064 (1931). This case discussed the adjudication process at length and held that New Mexico’s statutes intended to vest exclusive jurisdiction in the courts in adjudication cases. The El Paso Railway court found that, because of the comprehensive nature of an adjudication lawsuit – which in the case of large stream adjudications is likely to extend over several judicial districts – the court hearing such an adjudication must have exclusive jurisdiction over the adjudication to prevent needless waste of time in other courts, and to avoid the danger of conflicting orders being entered in different courts during the adjudication. 36 N.M. at 100, 8 P.2d at 1067-68 (noting that a similar need for consistency exists in water administration, as well

as a similar or even greater need for efficiency). Practically speaking, separate administration by different courts or by the state engineer on different stream systems is an invitation for inconsistent and contrary administration of water, thus preventing uniformity in water administration across the state. A further problem would exist with respect to adjudications in federal court, were courts to retain jurisdiction to administer water rights following the completion of adjudications. Where a federal court oversees an adjudication, administration by that court would be an impermissible infringement on the authority of a state to administer its own waters. Such authority has been repeatedly recognized even in federal law itself. See, e.g., 43 U.S.C. § 666 (1986) (waiving federal sovereign immunity to allow state administration of water in areas where the federal government owns water rights); see also 43 U.S.C. § 383 (1986) (subjecting the federal Bureau of Reclamation to state laws "relating to the control, appropriation, use, or distribution of water used in irrigation.").

For all these reasons, as well as in keeping with ordinary principles of statutory construction, this adjudication court's improper effort to retain continuing jurisdiction following the completion of the adjudication should be rejected.

III. THE ADJUDICATION COURT'S FAILURE TO OBSERVE THE STATE ENGINEER'S AUTHORITY TO ADMINISTER WATER AND WATER RIGHTS VIOLATES CONSTITUTIONAL SEPARATION OF POWERS PRINCIPLES

Article III, § 1 of the New Mexico Constitution provides that "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." N.M. CONST. art. III, § 1. This separation of powers provision "expressly forbids any department from

exercising powers properly belonging to either of the others.” Southwest Underwriters v. Montoya, 80 N.M. 107, 108, 452 P.2d 176, 177 (1969).

The seminal case regarding separation of powers issues in the water rights context is Fellows v. Schultz, 81 N.M. 496, 469 P.2d 141 (1970). In Fellows, the New Mexico Supreme Court rejected as unconstitutional a legislative effort to inject the district court into the administrative duties of the state engineer. The court quoted from an earlier decision:

[J]ust as the [administrative body] cannot perform a judicial function, neither can the court perform an administrative one Such a procedure inevitably leads to the substitution of the court’s discretion for that of the expert administrative body. We do not believe that such procedure is valid constitutionally.

Id. at 500, 145 (quoting Continental Oil Co. v. Oil Conservation Comm’n, 70 N.M. 310, 373 P.2d 809 (1962)(citation omitted)).

The Fellows case is exactly on point here. The assertion by the district court in this case of continuing jurisdiction over administration of water and water rights as adjudicated in the Final Decree impermissibly infringes on the statutory authority over administration of water and water rights conferred on the state engineer. In fact, the separation of powers problem posed in this case by the adjudication court’s assertion of jurisdiction over administration of water and water rights is even more stark than in Fellows because, unlike Fellows, the adjudication court can point to no action of the legislature in support of its assertion of jurisdiction.⁶

Further, were the court’s assertion of jurisdiction to administer water to be allowed, it would interfere with the state engineer’s administrative activity in the area, including the Mimbres portion of the state engineer’s state-wide AWRM initiative. The adjudication court’s separate administrative activities in this case would substitute this adjudication court’s specific

⁶ See 16A AM. JUR. 2D *Constitutional Law* § 270 (1979) (“A fundamental principle, scrupulously observed by the courts, is that the judiciary may not encroach upon the functions of the legislature or usurp its powers.”)

rulings in a single basin for the state engineer's state-wide approach, introducing the likelihood of inconsistency of administration between the Mimbres basin and other water systems in the state. Thus, under Fellows, the court's assertion of jurisdiction violates Article III, Section 1 of our Constitution.

New Mexico's well-developed body of case law on separation of powers issues in other contexts also demonstrates the unconstitutionality of the district court's improper assertion of continuing jurisdiction to administer water, echoing the concerns of the Fellows case. In Bd. of Educ. v. Harrell, for example, the court noted that "the real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments." 118 N.M. 470, 483-84, 882 P.2d 511, 524-25 (1994) quoting 1 Frank E. Cooper, STATE ADMINISTRATIVE LAW 16 (1965); see also Mowrer v. Rusk, 95 N.M. 48, 55, 618 P.2d 886, 893 (1980)(citation omitted)(discussing the separation of powers doctrine in terms of "the need for each branch of Government to be free from the coercive influence of the other branches."). This constitutional concern with the possibility of coercive influence between branches of government has a direct application in the present case, where the state engineer's expert administrative decisions would be constantly subject to the jurisdiction of the court. See Coe v. City of Albuquerque, 76 N.M. 771, 773, 418 P.2d 545, 547 (1966)(citation omitted) (determining that the statute that purported to allow the district court to zone land was unconstitutional because "[s]uch a procedure inevitably leads to the substitution of the court's discretion for that of the expert administrative body.").

Moreover, if the adjudication court followed the pattern already established in this case and appointed a state engineer employee as water master, (R.P. 25), the court would gain coercive control over state engineer funding, as the expenditure of funds for administration on

the Mimbres could be forced by court orders. This would be impermissible. See State ex rel. Schwartz v. Johnson, 120 N.M. 820, 821, 907 P.2d 1001, 1002 (1995)(citation omitted)(noting that “under constitutional separation-of-powers principles enunciated in Article III, Section 1 of the New Mexico Constitution, the legislature cannot delegate its power to appropriate money unless specifically authorized by the state constitution.”).

In State v. Fifth Judicial District Court, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932), the New Mexico Supreme Court rejected a district court’s attempt to take on the administrative function of collecting taxes, quoted Article III, Section 1 of the New Mexico Constitution regarding separation of powers, and remarked:

This is a wise provision. The Legislature makes, the executive executes, and the judiciary construes, the laws. Before a court may exercise an administrative function belonging inherently to another department of the government, it must appear that an appropriate attempt has been made to delegate such function to the courts, and that the attempt is not repugnant to the foregoing constitutional provision.

In the present case, far from making any attempt to delegate the function of water administration to the courts, the legislature has been very clear that it belongs to the state engineer. The adjudication court in this case, therefore, by refusing to respect the legislature’s intent that the state engineer oversee administration of water in New Mexico, has violated Article III, Section 1 of the New Mexico Constitution.

IV. THE PRESENT CASE ILLUSTRATES THE POLICY IMPORTANCE OF FOLLOWING THE STATUTORY SCHEME ASSIGNING ADMINISTRATION OF WATER AND WATER RIGHTS TO THE STATE ENGINEER RATHER THAN THE COURTS

The factual history of the present case provides a graphic illustration of the wisdom of the legislature in assigning the administration of water to the expert administrative agency. As discussed above, the state engineer was in 1993 erroneously willing to allow the adjudication

court to assert continuing jurisdiction. (R.P. 20). The results of that willingness have been disastrous.

Pursuant to the erroneous position taken by Mr. White in 1993 when he represented the State and worked for the state engineer, the State recommended that the adjudication court appoint R.Q. Rogers ("Mr. Rogers"), then a state engineer employee, as water master. (R.P. 20). The adjudication court appointed Mr. Rogers to serve as water master on February 17, 1993. (R.P. 25). Pursuant to an order of the adjudication court, on April 8, 2004 Mr. Rogers entered an order to govern a rotation system of water distribution for the senior ditch, SLCDA, and the upstream ditches. (R.P. 85, 88). On May 24, 2004, SLCDA diverted water from the Mimbres River during the time reserved for the upstream ditches to divert water. (R.P. 88-89). The water master informed the SLCDA that they were diverting contrary to the rotation schedule, but the SLCDA refused to comply with the order. (R.P. 89). After SLCDA continued to refuse to cease diversions contrary to the rotation schedule, the state engineer, on behalf of the State and the water master, requested that the adjudication court order that SLCDA was in contempt of court for its failure to comply with the water master order. (R.P. 87). On July 14, 2004, the adjudication court denied the state engineer's motion, concluding that there could be no contempt of court for non-compliance with a water master order unless the court adopted the order.⁷ (R.P. 126). As a result, the water master was without authority to enforce his order and, accordingly, the rotation agreement. Id. The adjudication court, by then aware of SLCDA's

⁷ To require court-adoption of each water master order before judicial enforcement of an order would lengthen the process of enforcing orders by adding additional steps and would restrict the water master's autonomous authority. If the water master cannot enforce his own orders in a timely fashion, his effectiveness in administering water rights is severely diminished. During drought conditions, a significant delay in the water master's actions might result in the wrongful diversion of water that simply cannot be replaced. Thus, the water master's goal of administering water rights would be completely undermined.

willful diversion of water contrary to the water master's order, nevertheless took no action against SLCDA or to otherwise administer the water rights. The court's effort to administer simply ceased and has since been at a standstill.

Nor can it be easily revived. Mr. Rogers retired from employment with the state engineer on May 20, 2005. (R.P. 220). The adjudication court has never appointed a water master in his place. As a result, the adjudication court is wholly unprepared to administer water even if it intends to do so, despite the fact that the 2006 irrigation season is well underway and despite the severe drought conditions on the river. Not only has the court failed to appoint a replacement water master, but also the adjudication court has failed to schedule hearings in a manner that permits effective day-to-day administration of water. See, e.g., R.P. 27 and 84; 244. Thus, the adjudication court has refused to relinquish the jurisdiction it asserts over administration of water, while simultaneously failing to administer the adjudicated water rights.

By contrast, the state engineer has made significant progress in administering water along the upper portion of the Mimbres River in the short time since the Mimbres has been made part of the AWRM program. As noted above, on December 16, 2005, prior to the 2006 irrigation season, the state engineer ordered the creation of the Upper Mimbres Water Master District (District) and appointed a district water master for the purpose of implementing his Active Water Resource Management initiative in the district pursuant to NMSA 1978, § 72-3-1 *et seq.* (R.P. 410). To assist with administration, the water master arranged for the installation of measuring devices on all ditches in the District, and installed a flume to measure releases of water stored in Bear Canyon Reservoir. On July 25, 2006, the state engineer entered Order No. 177, pursuant to 19.25.13.43 NMAC, for immediate administration of the District by the water master.

In addition, the state engineer intends to promulgate specific AWRM regulations for the District within the year, which will greatly assist in the administration of water in the district. The state engineer and his staff have held multiple public meetings to keep the Mimbres water rights owners informed of each stage of AWRM implementation. Upon completion of each of these actions, the state engineer's water master is better prepared to actively administer water within the water master district.

Thus, this case illustrates that the legislative intent that the state engineer administer water and water rights is not only clear in the law, but is more effective on the ground and therefore simply better for New Mexico.

CONCLUSION

The state engineer respectfully requests that the Court of Appeals reverse the decision of the adjudication court finding jurisdiction and decide that in light of statutory authority explicitly granting to the state engineer the authority to administer water, it is contrary to statute and inconsistent with separation of powers principles for an adjudication court to assert jurisdiction to administer water and water rights in conflict with state engineer administration.

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Respectfully submitted,

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