IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Court of Appeals of New Mexico
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No. A-1-CA-39034

DAVID MALEY,

Petitioner-Appellee,

v.

JOHN D'ANTONIO, JR., P.E.,
New Mexico State Engineer,

Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Raymond L. Romero, District Court Judge

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OPINION

BUSTAMANTE, Judge, sitting by designation.

{1} Appellee David Maley (Maley) applied for a permit to repair three wells located on property he owned. The Office of the State Engineer (the OSE) granted the permits, but placed substantial limits on Maley's ability to draw water from the wells. Aggrieved, Maley asked for a hearing on the limitations pursuant to 19.25.2.9 NMAC. In the course of the administrative proceeding, the Hearing Examiner granted the OSE's Water Rights Division's (the WRD) motion for summary judgment, ruling that Maley's claimed water right "is not valid and existing and has otherwise been abandoned." The state engineer accepted the Hearing Examiner's order and denied Maley's application. On de novo appeal, the district court ruled that the OSE did not have the authority to "adjudicate" Maley's claimed water right and declared the OSE's decision "void ab initio."

{2} The OSE appeals on two grounds. First, the OSE argues that the district court should not have entertained the jurisdictional argument made by Maley because Maley failed to exhaust his administrative remedies and/or failed to preserve the issue of the OSE's authority. We reject this argument.

{3} The OSE's more substantive argument presents a narrow issue of first impression in New Mexico's water law jurisprudence: In the course of processing a permit application seeking permission to repair old wells, may the State Engineer

consider and rule on whether a declared water right is invalid and/or abandoned? We conclude that the OSE does have such authority in the circumstances presented here, and, thus reverse the district court's contrary ruling.

BACKGROUND

{4} In October 2014, Maley and his wife were deeded property in Eddy County consisting of the surface rights to portions of eight sections of land, plus federal and state grazing allotments, and "all Water Rights or claims to Water Rights, whether declared or otherwise, including . . . all Water Rights which may be found in State Engineer OSE File Nos. C-1351, C-1351-X, and C-1351-X-2."[1] In August 2016, Maley simultaneously filed OSE "Change of Ownership" forms and applications for a permit to "repair and/or deepen well" for each of the Files noted in the deed. The OSE accepted the notice of change of ownership with the proviso that "acceptance by the [OSE] does not constitute a validation of the rights claimed."

{5} Following a review of its records, the OSE approved the applications for repair, but allowed water production from the wells for testing purposes only, and specifically provided that "[n]o water shall be appropriated and beneficially used under this permit." In accordance with NMSA 1978, Section 72-2-16 (2015), Maley requested a hearing pursuant to 19.25.2.9 NMAC. In the course of the hearing process, the WRD of the OSE filed a motion for summary judgment arguing that its

[1]We refer to the three collectively as "the Files."

records "rebut all claims that any water right existed from [the] claimed wells." In the alternative, the motion asserted that if any water rights existed at the time certain 1966 declarations were filed, they had been abandoned by Maley's predecessors.

{6} The WRD's memorandum in support of its motion attached materials from the OSE's records, beginning with an aerial surveillance report from May 1964—apparently prompted by the OSE's Declaration of the Carlsbad Underground Water Basin. The report noted no development in the area covered by the Declaration except for the Brantley and Ross farms. Maley's property is not within the boundaries of those farms.

{7} The OSE next attached the Declarations of Owner of Underground Water Rights filed in November 1966 by the then-owner of the property, Marlin J. Wiggins. The "base declaration" for the Files stated that water "had not been used last 2 years since I acquired this place." The declaration also noted that the wells had been seriously damaged by floods in the summer of 1966, such that "it was impossible to identify exactly the location."[2] The declarations filed by Wiggins included an affidavit signed by Joe Johns stating that he had seen crops irrigated on the parcels by two wells and a spring "during the crop seasons of 1938 to the present." Staff recommended that Wiggins' declarations for the Files be accepted for filing even

[2]The record includes a change of ownership form noting a transfer of all of the water rights to a Charles Clanton in March 1968. There is no further mention of Mr. Clanton in the record filed with this Court.

though it concluded that there was "nothing submitted to substantiate the claim to 3[-]acre feet per acre per annum." The declarations were accepted with the disclaimer that the "filing of these declarations does not in any way indicate affirmation of the State Engineer of the statements contained therein."

{8} The last entry by OSE staff regarding the Files prior to Maley's filings reflects a field check done in June 1969. That report notes that the property is "covered with a salt or marsh type of grass" and that there is no indication of any irrigation system. Further, "[o]f the two dug wells one is caving in and both are unused and in poor condition." There was apparently no activity in the Files from 1969 until Maley's filings in 2016.

{9} Maley's applications to repair the wells prompted the OSE to conduct a review of the Files and other information in its possession. The OSE also conducted a field check in October 2016. The OSE's review was summarized in a memorandum of recommendation issued in December 2016. The summary noted that the field check revealed no active cultivation through plowing or planting and no evidence of any method of water diversion for man-made application of water for irrigation. The OSE engineer in charge of the review concluded that no beneficial diversion and use of water under the original claims could be substantiated. As a result, the engineer recommended that the application to repair the wells be approved *only* with a condition that the wells could not be utilized until a permit was issued to transfer

valid existing water rights to the wells, or a permit to draw water from the wells was issued.

{10} Maley admitted all of the uncontested facts listed in the WRD's motion for summary judgment, and did not provide any factual information tending to show that any beneficial use of water had occurred in the fifty years following the filing of Wiggins' declaration of water rights. After oral argument on the motion, the Hearing Examiner entered his order granting the WRD's motion for summary judgment, and the State Engineer accepted and adopted the order. Maley timely appealed the order to the district court pursuant to NMSA 1978, Section 72-7-1 (1971).

{11} Maley's first pleading in the district court did not include any mention of the OSE's authority to deal with the question of the validity of Maley's declared water right. Following the entry of appearance of new counsel, Maley filed a motion for summary judgment asserting for the first time that the OSE did not have the authority to consider or rule on the issue of abandonment. Maley phrased the question as follows: "Does the OSE have authority to rule a declared water right is no longer valid due to abandonment when the water rights owner has not requested to move or change the water right?" Notably, Maley's prayer for relief was broader than the issue he framed. Maley also requested a declaration that the OSE could not condition any permits it granted to prevent appropriation of water under the Files. Maley also

requested a ruling that the declarations of water rights in the Files remain valid and must be recognized by the OSE "until and unless it files an appropriate abandonment or forfeiture proceeding in a court of competent jurisdiction and procures a judgment adjudicating the right to be invalid."

{12} The district court partially granted the motion. Relying on language from *Public Service Co. v. Reynolds*, 1960-NMSC-137, ¶ 28, 68 N.M. 54, 358 P.2d 621, the district court ruled that the OSE's decision to limit Maley's ability to use water from the Files was "an adjudication of [Maley]'s water rights, and is void ab initio." The district court declined to rule on what water rights, if any, Maley has in the Files because "that question [was] not before [it]." *See id.* ¶ 30. The OSE timely appealed to this Court.

DISCUSSION

I. The District Court Did Not Err in Entertaining the Jurisdictional Issue

{13} It is undisputed that Maley did not raise the issue of the OSE's power—or authority—to consider and rule on the issue of abandonment during the administrative proceedings before the OSE. The Hearing Examiner entered two scheduling orders in the matter—one in July 2017 and another in March 2018, following a failed mediation effort. Both orders provided a statement of issues to be litigated that included, "Whether the claimed water right is valid." Maley posed no objection to inclusion of the issue in the scheduling order. And, Maley did not raise

any objection to the OSE's authority to litigate the abandonment issue in his response to the WRD's motion for summary judgment on that very issue. As noted above, the issue was first raised in Maley's motion for summary judgment in the district court.

{14} The OSE argues that Maley's failure to assert the question of authority during the administrative hearing prevents him from first doing so in the district court appeal. The OSE first asserts that Maley failed to exhaust his administrative remedies, but then also frames its argument as a matter of waiver. The OSE relies heavily on our Supreme Court's opinion in *Lion's Gate Water v. D'Antonio*, to argue that applicants may not raise issues on appeal that they failed to raise in the administrative hearing. *See* 2009-NMSC-057, ¶¶ 24-30, 147 N.M 523, 226 P.3d 622. Given that jurisdiction in this context necessarily presents a question of law, our review is de novo. *See id.* ¶ 18.

{15} The OSE's reliance on *Lion's Gate Water* for its position on this aspect of the case before us is inapt. In *Lion's Gate Water*, the eponymous applicant filed an application for a permit to draw new water from the Gila River. *Id.* ¶ 3. In recognition of a series of court decrees and factual findings dating to at least 1960, the OSE determined that there was no unappropriated water available and summarily rejected Lion's Gate's applications pursuant to NMSA 1978, Section 72-5-7 (1985). *Lion's Gate Water*, 2009-NMSC-057, ¶ 7. There followed a years-long battle

between the OSE and Lion's Gate concerning the scope of the administrative hearing it had requested. *Id.* ¶¶ 8-16. The OSE eventually held a hearing, but limited the issue it would consider to whether "unappropriated water does exist." *Id.* ¶ 11 (internal quotation marks omitted). Lion's Gate argued that the OSE was required to consider all of the issues listed in NMSA 1978, Section 72-5-6 (1985). The OSE refused to expand the scope of the hearing and eventually secured summary judgment on the issue of unavailability of water. *Lion's Gate Water*, 2009-NMSC-057, ¶ 13. On appeal, the district court found that the OSE had erred in limiting the scope of its hearing. Notably, the district court also decided that it had "jurisdiction to hear all matters either presented or which might have been presented to the [s]tate [e]ngineer as well as new evidence developed since the administrative hearing." *Id.* ¶ 15 (alteration and internal quotation marks omitted).

{16} Our Supreme Court reversed the district court, rejecting Lion's Gate's argument that the Section 72-7-1(E) provision that appeals from the OSE "shall be de novo as cases originally docketed in the district court" meant that the district court could treat the case as an original action. *Lion's Gate Water*, 2009-NMSC-057, ¶ 28 (internal quotation marks and citation omitted). The Court noted that accepting Lion's Gate's argument would "render much of the water code and the administrative and remedial process it lays out superfluous." *Id.* The Court refused to supplant the broad powers given the OSE in the water code to administer "a

complete and exclusive means to acquire water rights." *Id.* ¶ 24. Specifically, it held that once the OSE found that no water was available, it was prohibited from holding a Section 72-5-6 hearing to consider the secondary issues of conservation of water and the public welfare. Since the OSE could not consider the secondary issues, neither could the district court. *Lion's Gate Water*, 2009-NMSC-057, ¶ 29.

{17} That analytical rationale does not apply in this case. In *Lion's Gate Water*, the OSE was faulted by the applicant for refusing to expand the scope of a Section 72-5-6 hearing beyond a dispositive threshold determination. Here, the OSE did nearly the opposite, something that—to our knowledge—it had never done before: seek and enter an unsolicited ruling that an applicant's "claimed water right is not valid and existing and has otherwise been abandoned" in the course of its administrative review of permit applications. The difference is not semantic. *Lion's Gate Water* involved OSE activities explicitly addressed—and limited—in the Water Code. Here, we are required to examine a novel OSE action that is not explicitly mentioned in the Water Code. By itself, that circumstance evokes a question about the OSE's authority—or power—to decide the issue of abandonment in the first instance. The simple question presented by the facts at hand is whether it can.

{18} This Court recently reaffirmed that "as creatures of statutory creation, administrative agencies are limited to exercising only that power and authority expressly granted to them by statute or necessarily implied by statute." *Concerned*

Citizens for Nuclear Safety v. N.M. Water Quality Control Comm'n, 2026-NMCA-021, ¶ 22, 584 P.3d 1115. In *Concerned Citizens*, we also noted that administrative agencies have the authority to "'examine facts and make a finding'" as to their own jurisdiction. 2026-NMCA-021, ¶ 22 (quoting *Cibas v. N.M. Energy, Mins. & Nat'l. Res. Dep't.*, 1995-NMCA-046, ¶ 17, 120 N.M. 127, 898 P.2d 1265). Had Maley challenged the OSE's authority to undertake the abandonment analysis in the course of the permit hearing, the OSE would have had to address it as a matter of subject matter jurisdiction. And, of course, the district court would have had the same issue brought to it. The OSE admits as much in its brief in chief when it states, "Had Maley argued before the [OSE] that the [OSE] lacked the authority to make an administrative determination of Maley's water rights the [OSE] would have had the opportunity to address the question. If the [OSE] had agreed with Maley's argument, the condition now on appeal would not have been imposed. Even if the [OSE] had not granted Maley his requested relief, the [d]istrict [c]ourt would have had the benefit of the [OSE]'s expertise on the question of what constitutes a water rights adjudication."

{19} Maley did not raise the jurisdictional challenge during the OSE's permit hearing. That failure, though, does not prevent him from raising it on de novo appeal. The OSE attempts to limit the issue presented before it to the no-beneficial-use permit condition it originally imposed. But the broader question of the OSE's

authority to decide the abandonment issue cannot be avoided. As such, Maley's failure to raise the issue during the administrative hearing is not fatal to his arguments on appeal. *See Allred v. N.M. Dep't of Transp.*, 2017-NMCA-019, ¶ 20, 388 P.3d 998.

II. The OSE Has the Authority to Decide the Issue of Validity in the Course of Permit-Related Administrative Hearings

{20} On appeal, the OSE emphasizes that the Water Code gives it "broad powers to administer the waters of the [S]tate" and that by necessary implication, it has the power to make administrative determinations regarding the validity and extent of claimed water rights. The OSE also argues that the statutory provisions for stream-wide judicial adjudication of water rights are not in direct conflict with its administrative powers and duties and do not preclude it from addressing issues of the existence or validity of water rights in the normal course of its permit review work. *See* NMSA 1978, §§ 72-4-13 to -19 (1907, as amended through 1982). Generally speaking, the OSE argues that the question of validity—in particular abandonment—is not required to be determined by the courts; it can take the proverbial "first crack" at the issue in appropriate circumstances, subject of course to ordinary review.

{21} In response, Maley argues that validity can only be determined by the courts. Maley relies primarily on Supreme Court opinions for his position, in particular *Public Serv. Co. v. Reynolds*, 1960-NMSC-137, 68 N.M. 54, 358 P.2d 621. Maley

in effect argues that, in this context, the term "adjudication" has a narrow and accepted meaning that limits decisions about the validity of water rights to the courts, perforce depriving the OSE of the power—or jurisdiction—to decide such issues in the first instance.

{22} Though both parties tend to paint their positions with too broad a brush, we conclude that the OSE's arguments are closer to the mark. Maley does not cite any provision in the Water Code or in the New Mexico Constitution that specifically precludes the OSE from considering the issue of validity in the course of its administrative tasks. *See Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 27, 289 P.3d 1232 (quoting with approval this Court's statement that "[t]he New Mexico Constitution contains nothing to indicate that determination of the elements of a water right is consigned exclusively to the judicial branch"). The same observation can be made with regard to the lack of any statutory or constitutional provision consigning the issue of validity exclusively to the courts. If there is no legislative source for preclusion, we must decide if court opinions preclude OSE action. We start by examining the duties and authority of the OSE.

A. The OSE's Explicit and Implied Authority

{23} Our New Mexico Supreme Court has stated that "[i]t is . . . a fundamental principle of administrative law that the authority of [an] agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may

fairly be implied therefrom." *Winston v. N.M. State Police Bd.*, 1969-NMSC-066, ¶ 3, 80 N.M. 310, 454 P.2d 967 (citing *United States v. Pennsylvania R.R. Co.*, 323 U.S. 612 (1945) and *Morrow v. Clayton*, 326 F.2d 36 (10th Cir. 1963)); *see Howell v. Heim*, 1994-NMSC-103, ¶ 8, 118 N.M. 500, 882 P.2d 541.

{24} That commonplace proposition has been applied in cases involving the Water Code and the OSE. Perhaps the clearest early example is *City of Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 379 P.2d 73. In that case, the City filed four separate applications for permits to draw underground water from the Rio Grande underground water basin. *Id.* ¶¶ 2, 3, 21. After a hearing, the OSE found that even though there were unappropriated waters in the underground basin, granting the permits would impair existing water rights to the surface waters of the Rio Grande and that steps would be required to offset such adverse effects. *Id.* ¶¶ 2-3. The City refused to take the measures the OSE suggested. *Id.* ¶¶ 2, 21. The OSE thus denied the City's permits.

{25} On appeal to the district court and in its arguments to our Supreme Court, the City argued that the OSE did not have the "power and authority" to interrelate surface and underground waters when it considered the permit request, nor could it require the City to reduce or retire surface water as an offset. *Id.* ¶ 22 (internal quotation marks omitted). The City asserted that the statutes describing the permitting process did not interrelate surface and underground waters and did not

otherwise give the OSE the ability to do so. *Id.* ¶ 24. The Supreme Court rejected the City's arguments, noting that the OSE had the same general supervisory authority over surface and underground waters, and, thus, the OSE could address the substantive rights in both sources in the same administrative proceeding if it found that they were interrelated. *Id.* ¶ 28. The Court in essence held that the OSE had the implied authority to respond to the physical reality that the waters sought to be appropriated by the City were intertwined and, thus, it could impose conditions that were protective of senior surface water users even though the application before it nominally involved only underground waters. *Id.* ¶¶ 30-32.

{26} Our Supreme Court's most sweeping statement came in response to the City's argument that the OSE could not require the retirement of Rio Grande surface rights because the OSE had "no jurisdiction over the fully appropriated water of the Rio Grande because the rights in this river system have not been adjudicated." *Id.* ¶ 46. The Court dismissed the "alleged 'jurisdictional' question" by noting the OSE had not adjudicated anything, and had "merely undertaken . . . to perform the duties which devolve upon [it] under [NMSA 1953, Sections] 75-2-1, 75-11-1, and 75-11-3." *Id.* We note that the current NMSA 1978, Section 72-2-1 (1982) is essentially identical to the 1953 compilation version. It must, then, be accurate to say that the OSE has a similar—if not broader—scope of implied authority today.

{27} Our Supreme Court's most recent statements regarding the breadth of the OSE's implied administrative authority are arguably even more expansive than those discussed above. In *Lion's Gate Water*, the Court was at pains to point out that the general purpose of the Water Code, especially with regard to water rights applications, is to give the OSE broad powers to "manage those applications through an exclusive and comprehensive administrative process that maximizes resources through its efficiency, while seeking to protect the rights and interests of water rights applicants." 2009-NMSC-057, ¶ 24. After reciting the numerous sections of the Water Code that guide the OSE's work, the Court concluded that they "clearly express the Legislature's intent that the water code and the administrative process it describes provide a complete and exclusive means to acquire water rights." *Id.*

{28} In *Tri-State*, our Supreme Court echoed and expanded on its *Lion's Gate Water* discussion of OSE administrative authority. In *Tri-State*, the Court held that NMSA 1978, Section 72-2-9.1 (2003)—enacted in 2003—granted new powers to the OSE to administer and manage priority disputes prior to completion of inter se court adjudications. *Tri-State Generation & Transmission Ass'n*, 2012-NMSC-039, ¶ 26. As part of its analysis, the Court noted that giving the OSE power to administer priority issues outside of a judicial inter se action did not interfere with the validity of ongoing court actions and did not run afoul of any constitutional separation of powers limitations. *Id.* ¶¶ 32-33. Citing *Lion's Gate Water* specifically, the Court

also noted that, in line with the Legislature's delegation to the OSE of the "complicated and difficult task of managing New Mexico's scarce water resources," the OSE had historically, of necessity, been involved with administering water based on priority determinations for years. *Tri-State Generation & Transmission Ass'n*, 2012-NMSC-039, ¶ 34. (citing *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 1958-NMSC-131, ¶¶ 44-46, 65 N.M. 59, 332 P.2d 465, as an example).

{29} A slightly different aspect of the OSE's broad administrative and regulatory power is found in *Carangelo v. Albuquerque-Bernalillo County Water Utility Authority*, 2014-NMCA-032, 320 P.3d 492. In *Carangelo*, the water authority filed a request for permission to divert surface waters from the Rio Grande to aid in its plan to build a new drinking water facility. The request asserted that the surface waters were needed to allow full use of waters being transported from its San Juan Diversion Project. The water authority asserted that none of the diverted water would be consumed or used for any purpose other than increasing the flow of water to the new facility. The water authority was clear that it was not seeking any new appropriation. *See id.* ¶¶ 9-12. Some protestors argued that the OSE did not have "jurisdiction" over the application because it did not fit into or rely on any statutory grant of power to the OSE. This Court rejected the argument, relying on the broad scope of the OSE's responsibilities under Section 72-2-1. *Carangelo*, 2014-NMCA-032, ¶¶ 17, 21, 24. In essence, this Court made the practical choice to recognize that

the OSE had a role in reviewing the massive diversion of Rio Grande water suggested even though it would not be required to approve any new appropriations, consider the impact of the water shuffle on other users, or consider its impact on conservation.

{30} *Eldorado Utilities, Inc. v. D'Antonio*, 2005-NMCA-041, 137 N.M. 268, 110 P.3d 76, presents another example of the OSE's power in dealing with claims to water rights. In *Eldorado Utilities, Inc.*, a private water utility attempted to file amended declarations for wells it had been operating for some twenty-six years. The utility asserted that it had discovered new information that indicated its first declarations were inaccurate. The new declarations used new wording for the uses of the water and greatly increased the declared usage. *See id.* ¶ 4. The OSE refused to accept the filing. The issue was whether the OSE could exercise any discretion under NMSA 1978, Section 72-12-5 (1931). This Court held that, in light of the broad powers granted it to implement and enforce the Water Code, the OSE had the discretion to refuse the amendment because material in its own files provided a sufficient base of knowledge from which it could conclude that the "rights asserted therein were not vested, as contemplated by Section 72-12-5." *Eldorado Utilities, Inc.*, 2005-NMCA-041, ¶¶ 12-13.

{31} The case most closely akin to the issue in this matter is *Hanson v. Turney*, 2004-NMCA-069, 136 N.M. 1, 94 P.3d 1. There, the plaintiff had acquired two

permits to appropriate water for irrigation purposes. *Id.* ¶ 3. The plaintiff drilled two wells, but never put any water to beneficial use. Sometime later, the plaintiff filed applications under NMSA 1978, Section 72-12-7(A) (1985), seeking a change to subdivision use. The OSE denied the change of use applications because no water had been put to use under the original permits. *Hanson*, 2004-NMCA-069, ¶ 3. This Court's analysis turned on whether the plaintiff was the "owner of a water right" within the meaning of Section 72-12-7(A). We concluded that she was not because putting water to beneficial use is a mandatory prerequisite to the maturation and acquisition of a water rights. A permit is but a first step in the process. *Hanson*, 2004-NMCA-069, ¶¶ 8-10.

{32} Our Courts' approach to the implied authority of the OSE applies neatly to the factual circumstance in this case. Maley filed for permits to repair the wells on the property in accordance with 19.27.1.39 NMAC. There is no question that the OSE has the authority under Section 72-2-1 and NMSA 1978, Section 72-2-8 (1967) to require a permit before repair work on wells could be performed. Upon receipt of the applications and review of the Files, the OSE would have necessarily noted that: (1) the first declaration of water rights filed in 1966 disclosed that the owner had not drawn from the wells on the property since 1964; (2) the wells were heavily damaged by a flood in 1966; (3) the OSE field check in 1967 prompted by the declaration revealed no evidence of recent cultivation, irrigation, or works for irrigation; (4) the

declaration was accepted with the proviso that the OSE was not affirming the accuracy of the statements made in the declarations; (5) a change of ownership filed in 1968, but there was no evidence of use of water connected with it; (6) the Files had lain fallow since a field check in 1969; and (7) there had likely been no beneficial use of water since 1964.

{33} In sum, the Files reflected a likely fifty-two year gap of beneficial use of water from the wells sought to be repaired. It beggars the imagination to think that the OSE would not have felt a duty to investigate the actual situation on the ground as it processed the applications. The Files on their face revealed questions about the validity of the declared rights, and raised red flags about the abandonment of any rights that might have been in effect in 1964. The OSE's field checks in response to the applications confirmed that there had likely not been any beneficial use for fifty-two years or more. Presumably, the OSE knew that New Mexico appellate courts have upheld findings of abandonment related to periods of unreasonably long nonuse ranging from twenty-four to forty-three years. *See State ex rel. Office of State Eng'r v. Intrepid Potash, Inc.*, 2025-NMSC-040, ¶¶ 33, 47, 580 P.3d 130.[3] Fifty-two years is a materially longer time. Failure by the OSE to react to the issue of validity would have allowed Maley to draw water he potentially did not own from a fully

[3] We note that Maley did not refute the OSE's investigations or factual findings.

appropriated basin. Such an outcome would obviously be detrimental to the public welfare of the state and contrary to the conservation of water.

{34} In light of these facts, it is clear from the case law surveyed above that the OSE would at the least have the implied authority to deny the applications outright, or to grant them with the initial conditions it actually imposed pending further investigation. The OSE in this instance went further and pursued a ruling from the Hearing Examiner that the water rights connected to the Files were not valid. The question then becomes whether there are any overriding limitations preventing the OSE from seeking a determination as to validity of the rights in the course of its administrative hearing.

B. New Mexico Case Law Does Not Prevent the OSE from Addressing the Validity of Claimed Water Rights in the Court of its Administrative Hearing Process

{35} Maley argues that the OSE lacked authority to "unilaterally" limit his declared water rights. Stated more broadly, Maley asserts that the OSE has no power to "adjudicate" the elements of water rights because that power belongs solely to the courts. Maley relies primarily on our Supreme Court's opinion in *Reynolds*, 1960-NMSC-137.[4] There, the Public Service Company filed an application for a permit to

[4]Maley also cites to *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560, 624 P.2d 502. *Rio Rancho Estates, Inc.* is distinguishable. It turned on the application and completion of *Mendenhall* rights under development by a municipality. The Court simply held that it was too early in the *Mendenhall*

drill a well changing the point of diversion of a portion of its underground water rights to ensure that it would have enough water to supplement its surface rights in times of drought. The Public Service Company's underground rights were a combination of pre-1907 and OSE permitted waters. *Id.* ¶ 9. The OSE granted the application with the condition that the total amount appropriated in any year should not exceed 5,040-acre feet. The OSE imposed the limit even though it had also found that the diversion proposed would not impact the rights of other users "or any other existing rights to the use of the public waters." *Id.* ¶ 23. The district court affirmed the OSE's order. *See id.* ¶ 6.

{36} On appeal to our Supreme Court, the Public Service Company argued that the OSE "had no authority in this proceeding to place any limitation" on its underground rights. *Id.* ¶ 17. By "this proceeding" the Public Service Company meant its request to change the point of diversion. The Public Service Company emphasized that it was not attempting to make new appropriations or to increase its claimed rights. *Id.* ¶¶ 20, 23, 27. As such the extent of it water rights were not implicated by its request. Our Supreme Court concluded that by limiting the Public Service Company's appropriation the OSE "did, in effect, adjudicate, or attempt to adjudicate, [the

process to limit the municipality's right to develop its rights as the city grew. *Rio Rancho Estates, Inc.*, 1981-NMSC-017, ¶¶ 13-16.

company's] claimed water rights . . . . This [the OSE] had no authority to do." *Id.* ¶ 28.

{37} In the factual context of *Reynolds*, our Supreme Court was correct. First, the OSE's action in limiting the Public Service Company's appropriation was premature. The permit request did not raise any issues of increased usage or claimed rights. And, the OSE found that there was no impairment to any other users' rights. Thus, there was simply no need to address how much water the company might be able to draw or claim in the future. Second, as the OSE notes, the limit placed on the production from the wells had the effect of rendering all of the declared underground water rights merely supplemental to the Public Service Company's surface rights even though the extent and nature of the underground rights were not the subject of the application.

{38} Third, and most importantly, a predictable effect of the limit would be to short-circuit the proceedings in any stream-wide or basin-wide adjudication that might be brought in the future under Sections 72-4-13 through -19—or their predecessor provisions. A major aspect of system-wide judicial adjudications is the gathering of as many parties as possible with claims to water rights in one proceeding, thus allowing all parties the opportunity to prove their rights and protect them from potential competing claims. As the Public Service company noted in *Reynolds*, it did not know the actual extent of its underground rights at the time its

application was processed because no one's rights had been fixed in a statutory judicial proceeding. 1960-NMSC-137, ¶ 22. It did know that it was not asking to expand its claims beyond those already on file with the OSE. The limit the OSE imposed would tend to fix its rights—in isolation—before the judicial procedure occurred. That might later work to its advantage or to its disadvantage, and might work to the advantage or disadvantage of other claimants. Either scenario would reduce the value and accuracy of the system-wide judicial action. All of these factors support the decision in *Reynolds.*

{39} But Maley overstates the meaning and effect of the *Reynolds* holding. Maley argues that the OSE does not have authority to engage in any decision making that effects the nature or extent of declared water rights in the absence of a request to change or move a right. We presume that the OSE generally does not preemptively canvass its files looking for opportunities to challenge user rights. It reacts to matters brought to its attention during the permitting process. Once brought to its attention, however, the OSE must have the power to react to information in its own files as it exercises its general supervisory powers over the waters of the State. *See* § 72-2-1. The cases detailed above reflect instances in which the OSE has exercised that power.

{40} *Hanson*—which Maley does not discuss in his briefing—exemplifies the process. 2004-NMCA-069. As stated, in *Hanson* the applicant sought to change from

irrigation to subdivision use. *Id.* ¶ 1. The difficulty with her request did not lie in the proposed change. There is no indication that the change of use affected any aspect of the claimed right other than the final destination of the water. The problem was that the applicant had not put any water to beneficial use, and as a result there was no "water right" to be changed. *Id.* ¶¶ 1, 9-13. The same analysis applies here. The OSE's files contained information strongly suggesting that whatever rights Maley and his predecessors might have claimed had been abandoned due to the passage of time.

{41} Moreover, Maley is simply incorrect when he argues that his application to repair the wells did not raise any issues that could bring into question the validity of his declared rights. The request to repair the wells obviously implied that the wells would be used to draw water after repair. Maley argues that he has the right to appropriate water until a court decides he cannot. Appropriating water after a fifty-two year hiatus must, as a practical matter, constitute a "change" sufficient to support the OSE's consideration of the validity of the declared rights. A declaration of water rights provides prima facie evidence of the claimed right, but New Mexico courts have recognized that the OSE has the authority to rebut presumptions created by pre-1907 declarations. *State ex rel. Martinez v. Lewis*, 1994-NMCA-100, ¶ 9, 118 N.M. 446, 882 P.2d 37. The same must hold true for pre-basin declarations such as Maley's.

C. Resort to the System-Wide Procedures of NMSA 1978, Section 72-4-17 (1959) is Not Required in These Circumstances

{42} As explained above, there is nothing in the Water Code or in New Mexico's water law jurisprudence that explicitly prevents the OSE from addressing the issue of the validity of Maley's claimed right as it did. Maley's assertion that the OSE's authority stops at the shore of Section 72-4-17, because all questions as to the validity of water rights can only be dealt with by the courts is insupportable. The question remains whether there are prudential reasons why we should reject the OSE's actions in this case. We conclude that there are none.

{43} First, as we noted above, the major aim of Section 72-4-17 actions is to provide global relief and clarity to water users drawing from the same stream or basin system. The opportunity to balance the competing claims of users with regard to usage and priority dates is obviously important. The potential impact of a ruling with system-wide effect is not appropriately left to the OSE's administrative process alone. The potential due process effects of such a ruling on nonparties is reason enough to limit the OSE's ability to act. An example of this concern is found in our Supreme Court's opinion *Reynolds*, cited above. There, the City argued that it was the owner of the pueblo water right of the original Pueblo de Albuquerque. *Reynolds*, 1962-NMSC-173, ¶ 1. The OSE argued that it did not have the "jurisdiction to adjudicate" the City's pueblo rights claim. *Id*. ¶ 8. The Supreme Court agreed, noting that a decision by the OSE on the matter would affect all other appropriators of the

Rio Grande and underground waters without notice of any kind to them. Such a result would obviously be anathema to them, and the Court summarily dismissed the argument. *Id.* ¶¶ 11-13.

{44} In contrast, there are no other users who might be affected by the OSE's administrative proceedings addressing the validity of Maley's rights. The issue is of concern only to him, and its resolution does not depend on anything except his ability to provide evidence of beneficial use during the fifty-two year period prior to his application for a permit. The OSE is frankly best suited to conduct the initial inquiry and decide the issue in the first instance. There is no need to resort to the statutory process.

{45} Neither are there any due process implications to allowing the issue to be addressed initially in the OSE's administrative process. First enacted in 1965, the OSE's hearing process has been in place for sixty years. *See* NMSA 1978, § 72-2-12 (1965). The procedures outlined in the OSE's regulations appear to be in order and comprehensive. *See* 19.25.2 NMAC (11/1/1966 as amended through 8/30/2013). In any event, Maley has not challenged the fairness or propriety of the OSE's hearing procedures. Perhaps most important is the de novo appellate process available under NMSA 1978, Sections 72-7-1 to -3 (1907, as amended through 1971). Maley—and others in the same position—have the right to have the courts review the OSE's rulings anew. It is difficult to perceive any prejudice to Maley in allowing the OSE

to rule first when its ruling is subject to review with no deference to the OSE's decision. As Maley has requested, the courts will have the final say in his case.

{46} Finally, we recognize that abandonment is a common law action. *Intrepid Potash, Inc.*, 2025-NMSC-040, ¶¶ 21-23. That fact by itself does not counsel, much less compel, a conclusion that the issue should be considered only by the courts. The OSE as an entity has decades of experience dealing with the entire range of issues affecting the validity of water rights, including the concept of abandonment. And, again, all OSE rulings are subject to de novo review on appeal.

CONCLUSION

{47} For the reasons explained above, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

{48} **IT IS SO ORDERED.**

MICHAEL D. BUSTAMANTE, Judge
Retired, sitting by designation.

WE CONCUR:

J. MILES HANISEE, Judge

MEGAN P. DUFFY, Judge