STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT
CONSERVANCY COURT

JANET JARRATT, JOE R. BACA, MARGARET CORDOVA WRIGHT, *et al*,	)	
Petitioners,	)	
v.	)	**No. D-202-CV-2012-008893**
MIDDLE RIO GRANDE CONSERVANCY DISTRICT	)	
Respondent,	)	

PETITIONERS' RESPONSE TO DISMISS PURSUANT TO RULE 1-012(b) NMRA

COMES NOW, A. Blair Dunn, Esq. and Martin E. Threet, Esq., Martin E. Threet and Associates, counsel for Petitioner in the above captioned matter, hereby respond to Respondent Middle Rio Grande Conservancy District's Motion to Dismiss Pursuant to Rule 1-012 (b) NMRA, and for their reasons state:

1. Petitioners deny Respondent's I and affirmatively state that Respondent is in error. This case is docketed in front of the Honorable Judge Shannon Bacon who is designated as the Conservancy Court Judge for the Second Judicial District Court. The requirement of NMSA 1978 § 73-14-4 that matters involving a conservancy district must be heard by a conservancy court is clearly satisfied and the jurisdiction of the Conservancy Court Judge is properly invoked. By the very analysis of Respondent this case is clearly where it is supposed to be and the argument for dismissal for improper venue must fail.

2. Petitioners deny Respondent's II to the extent that Petitioners have in any way violated statutory procedural provisions or that the conclusion of Respondent is in any way persuasive legal argument for the dismissal of a Petition for a Writ. Petitioners affirmatively argue that by Respondent's own reasoning it is their Motion that violates procedure and is premature. Petitioners do not disagree with the cases cited by Respondent to the extent that they stand for the proposition that jurisdiction has not yet been invoked over Respondent because no alternative or peremptory writ has yet issued from the Court. Petitioners admit that they have given notice to the Court that Respondent did agree to receive a copy of the Petition for Writ via email and service of the same was accomplished. But no summons or other type of document asserting jurisdiction or compelling action has been served upon Respondent and in fact what they have received could more appropriately be considered a courtesy.

More importantly, Respondents own argument makes the strong case that their entire Motion is premature such that it should be denied and likely struck from the record. Respondent cites *Alfred v. Anderson,* 86 N.M. 227, 230, 522 P.2d 79, 82 (1974) in support of NMSA 1978 § 44-2-11 which states that **"[n]o other pleading or written allegation is allowed than the writ and answer**" which presumably means that **no Motion to Dismiss** would be allowed at this juncture. Respondent's Motion should be denied.

3. Petitioner adopts the reasoning from above that the Motion should be denied as improperly made to the Court and, not waiving the same, affirmatively denies Respondent's III. Respondent's arguments assume that discretionary activities can be

carried out in a way that harms a constitutionally protected right of a person in their property. This argument holds no more water than the idea that a legislature in its discretion could enact a statute that violates a constitution, or that a court could interpret a statute to have superseded a constitution. It is well established that public officers cannot carry out actions that diminish private property rights through administration or regulation without causing a resulting inverse condemnation or taking without compensation in violation of the 5th Amendment to the United States Constitution. To argue that it was the intent of the New Mexico Legislature to give the Middle Rio Grande Conservancy District (MRGCD) that amount of "pure discretion" in discharging its duties is simply preposterous. Further, the legislature clarified the intent that the Respondent had a duty "[t]o protect the water rights of the lands and landowners of the district." NMSA 1978 § 73-14-47 (B) In fact, this section predates the statute cited to by Respondent by over two decades, but the requirement to "protect the water rights" was unchanged in the subsequent statutes. In 1951 subsequent to the legislative session creating NMSA 1978 § 73-14-47, the Respondent entered into a contractual relationship with the [now] Bureau of Reclamation which involved rehabilitation of the works of the MRGCD. At that time, the Respondent leveraged its assets pending repayment, and needed to clarify its authority versus that of the federal government. The Respondent cannot now ask this Court to interpret NMSA 1978 § 73-14-49 to be intended to grant the Respondent the discretion to strip the priority element of a property right away from that water right and have that action still be considered **protection of a water right.**

Going even further, Petitioners agree that *MRGCD v. Chaves*, as cited to by Respondent is dispositive of this matter, but it hardly stands for the argument that the

MRGCD "is vested **with full and total discretion"** such that they may trample the senior pre-existing water property rights in their administration of the district. In contrast, *MRGCD v. Chaves*, 44 N.M. 240, 101 P.2d 190, 194 (1940) states:

> **All water rights of the individual remain undisturbed;** but the administration of these rights, so far as impounding, diversion, carrying and delivering **of so much water for irrigation as any land owner under the project is by prior established right entitled to receive**, has now been placed in the hands of this new and superior authority, plaintiff District.

That case and those statutes do not stand for the proposition that the District was excused to administer water irrespective of priority but rather that the District had an explicit duty to deliver water in accordance with respect for the priority of those water rights. The Court asserted that "all water rights of the individual remain undisturbed", yet the diminution of those rights through methods of delivery unequivocally constitutes disturbance of those water rights. The Court further established that the MRGCD was to deliver "...so much water for irrigation as any land owner under the project is by prior established right entitled to receive", thus ensuring that prior rights would be not only respected, but fulfilled. The Respondent by its own admission in this very Motion is failing in its non-discretionary duty to deliver water in a way that does not harm those pre-existing senior water rights by stripping away their constitutionally protected element of priority.

Further, Respondent's Motion to Dismiss pursuant 1-012 (b) (6) is deficient because it only addresses one of the claims entered by Petitioners in their Writ. Even allowing for the sake of argument the Respondent's Motion was well taken it only addresses one of the claims upon which Petitioner relied in seeking their Writ.

WHEREFORE, Respondent's Motion should be denied, and Petitioners respectfully request that they be awarded appropriate fees and costs associated with responding to this improperly filed Motion, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

By /s/ A. Blair Dunn, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that I have emailed a copy of the foregoing response to opposing counsel on record on this 15th day of October 2012.

By: /s/ A. Blair Dunn ,
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